TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 144.

BERTON O. WETMORE, ADMINISTRATOR OF THE ESTATE OF CHARLES H. WETMORE, DECEASED, TO THE USE OF JOHN F. McKAY, PLAINTIFF IN ERROR,

vs.

JAMES L. KARRICK.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 3, 1905.

(19,952.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 28, 1906.

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In the Court of Appeals of the District of Columbia.

BERTON O. WETMORE, Administrator, &c., Appellant,
vs.
JAMES L. KARRICK.
No. 1601.

a Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff,
vs.
JAMES L. KARRICK, Defendant.
At Law. No. 46600.

UNITED STATES OF AMERICA,
District of Columbia. } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause to wit:—

1 *Declaration and Affidavit.*

Filed Dec. 1, 1903.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff,
vs.
JAMES L. KARRICK, Defendant.
At Law. No. 46600.

Berton O. Wetmore, as administrator of the estate of Charles H. Wetmore, deceased, having duly qualified as such administrator in the probate court of Suffolk county, in the State of Massachusetts and to whom letters of administration as such administrator were duly issued by the said probate court of Suffolk county, Massachusetts, a duly authenticated copy of which said letters of administration under the seal of the said probate court are now brought here in court and filed herewith, to the use of John F. McKay, plaintiff,

sues the defendant James L. Karrick, for that the plaintiff's intestate the said Charles H. Wetmore, in the superior court within and for the county of Suffolk, in the State of Massachusetts, held at Boston, Massachusetts, on the twentieth day of November A. D. 1900, being a court of record of said State duly held and having jurisdiction in that behalf, by the consideration and judgment of said court, recovered against the said defendant, a judgment for the sum of twelve thousand eight hundred and eighty one dollars and forty-six cents, and also the sum of forty dollars and forty-six cents costs, whereof the said defendant was convicted, as appears by a copy of the record of said superior court for Suffolk county, duly certified, annexed hereto and marked Exhibit A, and made a part hereof; which judgment remains of full force, and is not annulled, reversed, or satisfied, and upon which the plaintiff has not obtained any execution or satisfaction. Yet the said defendant though often requested thereto, has not paid the said sum or any part thereof to the plaintiff, but the same remains due and wholly unpaid. And the plaintiff as administrator aforesaid claims of the said defendant the sum of twelve thousand nine hundred and twenty-one dollars and ninety-two cents, with interest at the rate of six per centum per annum from November 20, A. D. 1900, until paid, besides costs.

WM. L. FORD,
Plaintiff's Attorney.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WM. L. FORD,
Plaintiff's Attorney.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff,
vs.
JAMES L. KARRICK Defendant.
} At Law. No. 46600.

STATE OF MASSACHUSETTS, *County of Suffolk,* } *ss*:

John F. McKay, being first duly sworn makes oath that he is the use or beneficial plaintiff named in the foregoing declaration and that Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, is the nominal plaintiff therein, and that the plaintiff has a good cause of action against the defendant
2 James L. Karrick named in said declaration which said declaration and the exhibit referred to therein are made a

part hereof; that the cause of the plaintiff's action against the defendant is a judgment obtained by the said Charles H. Wetmore, in the superior court within and for the county of Suffolk, in the State of Massachusetts, the same being a court of record, on the 20th day of November A. D. 1900, for the sum of $12,881.46 and $40.46 costs, which bears interest at the rate of six per centum per annum from said date until paid, and which said sums amounting to $12,921.92, with interest as aforesaid, are due the plaintiff by the said defendant in full and exclusive of all set-offs and just grounds of defense; that said judgment has not been paid off or satisfied in any manner whatever, and that the plaintiff has a just right to recover from the defendant the total amount of said judgment and costs and interest as claimed in the annexed declaration; that the affiant is the assignee for a valuable consideration of the original cause of action on which said judgment is founded, and that the original suit in the superior court of Suffolk county, Massachusetts, as set out in the exhibit before mentioned, was brought for his use and benefit, and that he is now the beneficial owner of said judgment, and that the affiant has personal knowledge of the facts herein stated and the claim as set forth in said declaration and this affidavit; and that the defendant in said declaration is *bona fide* indebted to the plaintiff over and above all discounts as herein stated.

JOHN F. McKAY.

Subscribed and sworn to before me this 20″ day of November A. D. 1903.

EDWARD B. COFFIN,
Notary Public.

[NOTARIAL SEAL.]

EXHIBIT A.

Filed Dec. 1, 1903.

COMMONWEALTH OF MASSACHUSETTS:

I, Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts,

Do certify, that Jos. A. Willard Esq. whose signature is affixed to the papers hereunto annexed, is clerk of said superior court, within and for the county of Suffolk, and hath the keeping of the files, records, and proceedings of said court, within and for said county; also of the late court of common pleas, within and for said county, and of the late superior court of the county of Suffolk, aforesaid; that he is, by law, the proper person to make out and to certify copies of the files, records, and proceedings of said several courts; that full faith and credit are and ought to be given to his
3 acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1 to 45

inclusive of the files, records and proceedings of the said superior court is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be hereunto affixed, this second day of February in the year of our Lord one thousand nine hundred one.

[COURT SEAL.] ALBERT MASON,
Chief Justice of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our records of our superior court for the said county of Suffolk, it is thus contained, the following being the entire record in the case.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To the sheriffs of our several counties or their deputies, Greeting:

[SEAL.] We command you to attach the goods or estate of James L. Karrick of Boston in the county and Commonwealth aforesaid to the value of twenty thousand dollars and summon the said defendant (if he may be found in your precinct) to appear before our justices of our superior court, to be holden at Boston, within and for our said county of Suffolk, on the first Monday of October next, then and there in our said court to answer unto Charles H. Wetmore of said Boston in the county and Commonwealth aforesaid, in an action of contract.

First count. And the plaintiff says that on February 11th, 1892, he was the owner of land on corner of Dudley and Greenville streets, Boston, upon which he was erecting three apartment houses; that at said time the defendant was the assignee and owner of a third mortgage upon said property for seventy thousand dollars, which said mortgage was given by plaintiff to one A. J. West, in connection with an agreement by said West that he would advance plaintiff thirty thousand dollars to enable him to erect three apartment houses upon said land, which said agreement was assigned by said West to defendant; that on the 11th day of February 1892, the defendant made a contract in writing with the plaintiff of which a copy is hereto annexed, marked "A"; that the defendant knew at the time of making said contract that the plaintiff was building said houses on said land, and the defendant also knew at the time that plaintiff had no money of his own which he could use in the completion of said buildings, and that he, plaintiff, could not obtain sufficient credit to finish them: and that he, defendant, had all of plaintiff's property within his control, and

that plaintiff had no other property upon which he could borrow sufficient money to complete said buildings. And said agreement "A" was made with the above knowledge on the defendant's part, and for the purpose of enabling the plaintiff to complete said buildings. And the defendant knew that a failure on his part to keep agreement "A" would prevent the plaintiff from performing and keeping the conditions and agreements called for by the mortgage upon said land and buildings, and would cause a technical and literal breach of the agreement and conditions on the part of the plaintiff. And defendant was secured upon said agreement "A" by virtue of the fact that he had acquired the West mortgage, and had a right to apply the amounts which he might advance, under the agreement "A" to said West mortgage so that said advances would have been secured under said West mortgage, and also by personal property of the plaintiff within the control of the defendant.

And the plaintiff says the defendant failed to make said advances which he agreed to make in said contract "A," and broke and failed to carry out said contract, although the plaintiff was ready and willing to keep his part of the same, and did keep it, and that in consequence of said failure and breach by the defendant, the plaintiff was unable to get any income from said property which would enable him to meet the interest and other charges on said mortgages on said property when they became due, and was unable to obtain money from any source to meet the said charges and interest which might become due on said mortgages and was unable to complete said buildings. And the defendant, well knowing all the foregoing facts, failed to make the advances called for in said contract "A" and entered and took possession under said Wetmore-West mortgage and foreclosed the same, and the plaintiff thereby, in consequence of defendant's breach of the said contract "A" lost said property and the large profits which he would have made on said property and houses had the defendant kept said contract "A," all to his damage.

Second count. And the plaintiff says that on February 11th, 1892, he was the owner of a lot of land on the corner of Dudley and Greenville streets Boston, and was building on the same three apartment houses: that at the said time the defendant was the assignee and owner of a third mortgage on said property, given by plaintiff to one A. J. West, who formerly owned the property: that there was an agreement between West and plaintiff which said agreement is annexed marked "E," by which West agreed to advance the plaintiff thirty thousand dollars ($30,000) to enable the plaintiff to erect three apartment houses upon said land, and that the defendant assumed the obligations of said West in the premises under said mortgage and agreement between West and the plaintiff: that the plaintiff was having large amounts of material to be used in the construction of said buildings coming from outside and distant places: and the defendant agreed with the plaintiff that if the plaintiff would give the defendant a

mortgage for four thousand dollars upon certain personal property, then owned by the plaintiff, a copy of which said mortgage is hereto annexed marked "B," the defendant would pay all freight charges and charges of transportation which might become due upon materials to be used in the construction of said buildings, and deliver the same on the premises: that the defendant knew at the time of making of said contract that the plaintiff was building said houses on said land, and the defendant also knew at the time that the plaintiff had no money of his own which he could use in the completion of said buildings, and that the plaintiff could not obtain sufficient credit to finish them, and that the defendant had all plaintiff's property within his control, and that the plaintiff had no other property upon which he could borrow sufficient money to complete said buildings, and said agreement "A" was made with the above knowledge on the defendant's part, and for the purpose of enabling the plaintiff to complete said buildings. And the plaintiff says the defendant failed to make any of said payments when called for or any of said deliveries, although often requested so to do by the plaintiff, and broke and failed to carry out said agreement for which said mortgage was given, although the plaintiff was ready and willing to keep his part of the same and did keep it. And that, in consequence of the defendant's failure and breach, the plaintiff was unable to get necessary material or money to enable plaintiff to complete the construction of said buildings: was unable to get any income from said property which would enable him to meet the interest and other charges on said Wetmore-West mortgage on said land and buildings, and was unable to obtain any money from any source to meet interest and charges which might become due on said mortgage. And the defendant well knowing the foregoing facts, entered and took possession, under said Wetmore-West mortgage, and foreclosed the same and the plaintiff thereby, in consequence of defendant's breach of the contract made at the time of giving mortgage "B" lost all of said land and buildings and the large profits he would have made had the defendant kept the said contracts of February 11th 1892, all to his damage.

Third count. And the plaintiff says the defendant made a promissory note, payable to plaintiff, a copy whereof is hereto annexed marked "C." And the defendant owes the plaintiff the amount of said note and interest thereof.

Copy.

"C." BOSTON, 11*th February*, 1892.

Three months after date, I promise to pay Charles H. Wetmore, four thousand dollars. Payable at my office, in Ames building, Boston.

Value received.

($4,000. xx / 100.)

(Signed) JAMES L. KARRICK.

6 Fourth count. And the plaintiff says on the eleventh day of February 1892. he was the owner of land on the corner of Dudley and Greenville streets, Boston, said property being formerly owned by one West, and said West had given a second mortgage on said property for sixty-five thousand dollars, to one Otis Sheppard, the said mortgage being given by said West for the purpose of securing said Sheppard for the full amount of the purchase money of said land, thirty-five thousand dollars ($35,000.) and for advances to be made by said Sheppard, on his written agreement with West, to the amount of thirty thousand dollars, ($30,000) to said West, in the erection of three apartment houses on said land, and the defendant held a third mortgage, given by plaintiff to one West, for seventy thousand dollars ($70,000.00) which said mortgage said West assigned to the defendant: that plaintiff succeeded to the rights of said West in the property, and said Sheppard-West agreement, and the defendant succeeded to and assumed the obligation of said West and Sheppard in the premises, and that on the 11th day of February 1892, there remained to be advanced under said agreements, about twenty-four thousand dollars: that at the defendant's request and instigation, it was agreed between plaintiff and the defendant, that if the plaintiff would give the defendant a mortgage for twenty-one hundred and eighty-two dollars—a copy of which said mortgage is annexed, marked "D,"—on property then owned by the plaintiff, he, the defendant would advance to the plaintiff, for the purpose of enabling the plaintiff to carry on the construction and completion of said building, the sum of twenty-one hundred and eighty-two dollars ($2,782.) that the said twenty-one hundred and eighty-two dollars ($2182.) so to be advanced by the defendant, upon the strength of said mortgage, should be deducted from the amount which the defendant was then obligated to advance to the plaintiff under the said Sheppard-West and Wetmore-West and defendant's agreement with plaintiff of February 11th, 1892: and it was also agreed as a part of said agreement and contract, that the plaintiff and defendant should execute the contract of which a copy is hereto annexed marked "A," which the said parties did execute. That the defendant knew at the time of making of said contract that the plaintiff was building said houses on said land and the defendant also knew at the time that plaintiff had no money of his own, which he could use on the completion of said buildings: and that he, plaintiff, could not obtain sufficient credit to finish them, and that he, defendant, had all plaintiff's property within his control and that he, plaintiff, had no other property upon which he could borrow sufficient money to complete said buildings. And said above agreements "A," were made with the above knowledge on the defendant's part and for the purpose of enabling the plaintiff to complete said buildings. And the plaintiff says the defendant failed to keep said contract and arrangement made in connection with said mortgage for twenty-one hundred and eighty-two dollars, ($2182.) and also failed to make
7 any advances or payments on account of the same, although the plaintiff was ready and willing to keep his part of said

contract, and did keep it. And that in consequence of the failure and breach of the defendant, the plaintiff was unable to get any income from said property, which would enable him to meet the interest and other charges on said property when they became due and was unable to obtain money from any source to meet the charges and interest which might become due on said mortgage. And the defendant well knowing the foregoing facts, entered and took possession under said Wetmore-West mortgage and foreclosed the same, and the plaintiff thereby, in consequence of defendant's breach of the agreement "A" and breach of the said contract for which said mortgage, hereto annexed, marked "D" was given, lost all of said land, buildings and property, and the large profits he would have made had the defendant kept the said contracts of February 11th, 1892, all to his damage.

Fifth count. And the plaintiff says that as a partial security for his giving the mortgage of personal property for four thousand dollars and the mortgage of personal property for twenty-one hundred and eighty-two dollars, ($2182.)—copies of which said mortgages are hereto ann-xed marked "B" and "D," and making the contract "A," the defendant gave the plaintiff a promissory note, a copy of which is hereto annexed marked "C," and the plaintiff says the defendant did not keep his said contracts and undertakings, and the defendant owes the plaintiff the amount of said note and interest thereon.

(Copy.)

"A."

This agreement made this eleventh day of February 1892, by and between James L. Karrick of Boston and Charles H. Wetmore of Boston, witnesseth:

All former agreement are annulled and void. Now in consideration of these presents *to* the said Wetmore agrees to finish the three apartment houses on the lot of land at the corner of Dudley and Greenville Sts. Roxbury, according to the plans drawn by Wait & Cutter the buildings are to be finished in the manner usual to first class buildings of this class, steam heating plant, and all work and material to be first class and of the best quality and workmanship. Said Wetmore agrees to push the work continually and with all possible dispatch, and to finish same on or before May 1st 1892. The said Karrick agrees to loan or advance to said Wetmore in the manner hereinafter set forth the following sums of money. When the first floor is on and completed of the building on the corner of Dudley and Greenville Sts. $200,00 when the second floor is on $425.00 when the third floor is on $450.00 when the 4th floor is on $450.00 when the roof is on $600.00 also on
8 the building next to Hotel Dearbourn on Dudley St. when the 3rd floor is on $450.00 when the 4th floor is on $450. when the roof is on $600.00. Also when the buildings above mentioned are

ready to plaster $700.00 on each. When the — plastered and windows hung $950.00 on each, when standing finish is up $600.00 on each when the plumbing is complete and floors laid and doors hung $1050. on each, when finished and ready for occupancy $950.00 on each and thirty days after completion $1350.00 on each. Also on the Greenville St. house when plastered and windows hung $950.00 when standing finish is up $450.00 when plumbing is in doors hung and floors laid $1100.00 when completed $950.00 and thirty days after completion $1350.

Provided always, however, and these presents are upon condition that said Karrick shall not be required to advance any sum while any sums are due him from Wetmore for insurance, bills expenses or money advanced or for any reason whatever nor shall Karrick be required to advance any sum until an equal amount has been paid to him by Otis Shepard on an agreement between said Shepard and Albert J. West which agreement has been transferred to Karrick by West. This agreement is also subject to every condition and in every way to that agreement between Shepard and West.

Witness our hands and seals the day and year above first mentioned and to a like agreement, (eight words interlined in space two lines from bottom of opposite page.)

(Signed) C. H. WETMORE. [SEAL.]
JAMES L. KARRICK. [SEAL.]

(Copy.)

"E."

This agreement made this twenty-seventh day of May, 1891, by and between Albert J. West of Braintree, Mass., party of the first part and Charles J. Wetmore of Boston, part- of the second part witnesseth:

That whereas the said party of the first part has this day loaned the said party of the second part the sum of thirty thousand dollars on his mortgage note of even date herewith, and whereas to secure the said loan the said party of the second part has this day executed and delivered to the said party of the first part his mortgage deed of even date herewith of a certain piece or pacel of land situated in Roxbury corner of Dudley and Greenville streets this day purchased of said party of the first part by the said Wetmore.

Now therefore in consideration of the premises the said party of the second part agrees to build and complete at once three buildings on said lot according to plans shown this day or if modified to
9 be of equal cost to those shown, said buildings to be built in a substantial and workmanlike manner and to be finished in like manner to other buildings of same class, and said party of second part agrees that as soon as the buildings are insurable, they shall be insured and kept insured during the continuance of said

mortgage in such sum or sums as will indemnify said party of the first part mortgagee as his interest may appear.

And it is understood by said parties to this agreement that the said sum of thirty thousand dollars, is to be advanced in cash by the said party of the first part to the party of the second part in the following manner, viz.

$1000. on each building when the first floor is on.
$800. " " " " " second
$800. " " " " " third
$800. " " " " " fourth
$1000. " " " " " roof is on.
$800. " " " " " ready to plaster.
$1000. " " " " " plastered and windows hung.
$500. " " " " " standing finish is up.
$1000. " " " " " plumbing is in doors hung and floor laid.
$1000. " " " " " when completed.
$1300. " " " " " 30 days after completion.

Provided always that these presents are upon the condition, that at the time or times when either or any of said advances are to be made, no lien shall exist upon said mortgaged premises and at the time mentioned for the last payment there shall be no possibility of any lien or incumorance than can effect or impair the security of said mortgage.

In witness whereof we the said parties hereto set our hands and seals for ourselves our heirs or assigns the day and year first above mentioned.

(Signed) ALBERT J. WEST. [SEAL.]
CHARLES H. WETMORE. [SEAL.]

"B."

Know all men by these presents that I Charles H. Wetmore of Boston in the county of Suffolk and Commonwealth of Massachusetts, in consideration of four thousand ($4000) dollars to me paid by James L. Karrick of Boston aforesaid the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said James L. Karrick, the following goods and chattels, namely about five hundred and seventy-four thousand (574 M) bricks more or less, consisting of light hard and face bricks now situated on Mystic wharf in Chelsea and about to be hauled to the corner of Dudley and Greenville streets in said Boston, including the bricks there now piled, also one hundred window frames at Dudley street
10 aforesaid, and about fourteen thousand feet of lumber covering said bricks on Mystic wharf. To have and to hold all and singular the said goods and chattels to the said James L. Karrick and his executors, administrators, and assigns to their own use and behoof forever. And I hereby covenant with the vendee that I am the lawful owner of the said goods and chattels: that

they are free from all incumbrances; that I have good right to sell the same as aforesaid: and that I will warrant and defend the same against the lawful claims and demands of all persons. Provided nevertheless, that if I, or my executors, administrators, or assigns, shall pay unto the vendee, or his executors, administrators, or assigns, the sum of four thousand ($4000) dollars in three (3) months from this date, with interest as stated in my note of even date signed by me, and until such payment shall keep the said goods and chattels insured against fire in a sum not less than — dollars for the benefit of the vendee, and executors, administrators, and assigns, in such form and in such insurance companies as they shall approve: shall not waste or destroy the said goods and chattels, nor suffer them or any part thereof to be attached on mesne process: and shall not, except with the consent in writing of the vendee or his representative, attempt to sell or to remove from said Dudley and Greenville streets, the same or any part thereof, then this deed, as also the aforesaid note, shall be void. But upon any default in the performance or observance of the foregoing conditions, the vendee or his executors, administrators, or assigns, may sell the said goods and chattels at public auction, first giving three days' notice in writing of the time and place of sale to me, or my representatives, or by leaving such notice at my last and usual place of abode, or publishing such notice once a week for three weeks in some one newspaper published in said Boston. And out of the money arising from such sale the vendee, or his representative shall be entitled to retain all sums then secured by this mortgage, whether then orthere after payable, including all costs, charges, and expenses incurred or sustained by him or them in relation to the said property, or to discharge any claims or liens of third persons affecting the same rendering the surplus if any, to me or my executors, administrators, or assigns. And it is agreed that the vendee or his executors, administrators, or assigns, or any person or persons in their behalf, may purchase at any sale made as aforesaid, and that until default in the performance or observance of the condition of this deed, I and my executors, administrators, and assigns, may retain possession of the above mortgaged property, and may use and enjoy the same, but after such default, the vendee or those claiming under me, may take immediate possession of said property, and for that purpose may so far as I can give authority therefor, enter upon any premises on which said property or any part thereof may be situated and remove the same therefrom. In witness whereof, I the said Charles W. Wet-
11 more, hereunto set my hand and seal this eleventh day of February in the year one thousand eight hundred and ninety-two.

CHARLES H. WETMORE AND SEAL.

Signed and sealed in presence of

—— ——.

February 12, 1892, 11 & 1 min. a. m.—Rec'd. Ent'd & ex'm'd per
JOHN M. GALVIN, *City Clerk.*

CITY OF BOSTON, *Sept.* 12, 1892.
A true copy from records of mortgages Lib. 667, fol. 148.
JOHN M. GALVIN, *City Clerk.*

"D."

Know all men by these presents that I Charles H. Wetmore of Boston in the county of Suffolk and Commonwealth of Massachusetts, in consideration of twenty one hundred and eighty-two ($2182). dollars to me paid by James L. Karrick of Boston aforesaid, the receipt whereof is hereby acknowledged do hereby grant, sell, transfer and deliver unto the said James L. Karrick, the following goods and chattels namely, about five hundred and seventy-four thousand (574 M) bricks more or less consisting of light hard and face bricks now situated on Mystic wharf in Chelsea in said Suffolk, and about to be hauled to the corner of Dudley and Greenville street- in said Boston including the bricks there now piled and one hundred window frames at said Dudley street and also about fourteen hundred feet of lumber covering said bricks on Mystic wharf subject to a mortgage for four thousand dollars. To have and to hold all and singular the said goods and chattels to the said James L. Karrick and his executors, administrators and assigns to their own use and behoof forever. And I hereby covenant with the grantee that I am the lawful owner of the said goods and chattels; that they are free from all incumbrances, except as aforesaid that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons. Provided nevertheless that if I or my executors, administrators or assigns shall pay unto the grantee or his executors, administrators or assigns the sum of twenty-one hundred and eighty-two dollars in one month from this date with interest as stated in my note of even date signed by me and until such payment shall keep the said goods and chattels insured against fire in a sum not less than — dollars for the benefit of the grantee and — executors administrators and assigns in such form and in such insurance companies as they shall approve, shall not waste or destroy the said goods and chattels, nor suffer them or any part thereof to be attached
12 on mesne process and shall not except with the consent in writing of the grantee or his representatives attempt to sell or to remove from said Dudley & Greenville streets the same or any part thereof, then this deed as also the aforesaid note shall be void. But upon any default in the performance or observance of the foregoing condition the grantee or his executors, administrators or assigns may sell the said goods and chattels at public auction, first

giving three days' notice in writing of the time and place of sale to me or my representatives or by leaving such notice at my last and usual place of abode, or publishing such notice once a week for three successive weeks in some one newspaper published in said Boston. And out of the money arising from such sale the grantee or his representatives shall be entitled to retain all sums then secured by this mortgage, whether then or thereafter payable including all costs, charges and expenses incurred or sustained by him or them in relation to the said property or to discharge any claims or liens of third persons affecting the same rendering the surplus, if any, to me or my executors, administrators or assigns. And it is agreed that the grantee or his executors, administrators or assigns or any person or persons in their behalf may purchase at any sale made as aforesaid; and that until default in the performance or observance of the condition of this deed, I and my executors, administrators and assigns may retain possession of the above mortgaged property and may use and enjoy the same but after such default the grantee or those claiming under me may take immediate possession of said property and for that purpose may, so far as I can give authority therefor enter upon any premises on which said property or any part thereof may be situated and remove the same therefrom.

In witness whereof I the said Charles H. Wetmore hereunto set my hand and seal this eleventh day of February in the year one thousand eight hundred and ninety two.

CHARLES H. WETMORE AND SEAL.

Signed, sealed and delivered in presence of

—— ——.

February 12, 1892, 11 & 1 min. a. m.—Rec'd, ent'd, & ex'm'd per
JOHN M. GALVIN, *City Clerk.*

CITY OF BOSTON, *September* 12, 1892.

A true copy from records of mortgages, Libro 667, folio 150.
Attest: JOHN M. GALVIN, *City Clerk.*

To the damage of the said plaintiff (as he says) the sum of twenty thousand dollars, which shall then and there be made to appear, with other due damages. And whereas the said plaintiff says, that the said defendant has not in his own hands and possession, goods and estate to the value of twenty thousand dollars aforesaid,
13 which can be come at to be attached, but has intrusted to and deposited in the hands and possession of the Mechanics national bank, a corporation duly organized under the laws of the United States and having its place of business at Boston, and the Northampton Institution for Saving- a corporation duly organized under the laws of Massachusetts and having its usual place of business at Northampton in the county of Hampshire and Common-

wealth aforesaid, trustees of the said defendant's goods, effects and credits, to the said value: We command you, therefore, that you summon the said supposed trustees (if they may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any they have why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against the defendant's goods, effects, or credits in the hands and possession of the said trustees. And have you there this writ with your doings therein.

Witness, Albert Mason, Esquire, at Boston, the second day of September in the year of our Lord one thousand eight hundred and ninety-two.

JOS. A. WILLARD, *Clerk.*

On which said writ are the following returns by the officers who served the same, to wit:

BOSTON, *September 2nd*, 1892.

SUFFOLK, *ss:*

By virtue of this writ I this day at 30 minutes past 3 o'clock p. m. attached all the right, title and interest — the within named James L. Karrick has in and to any and all real estate in the county of Suffolk and at the same time I attach specially as the property of said Karrick the following described real estate the record title to which stands in the name of Henrietta B. Karrick, viz: Beginning at a point in the southerly side of Allston street, Boston, on a line in prolongation of the middle of brick partition wall thence running southerly on said line and through the middle of a brick partition wall 106 52/100 feet by land now or formerly of E. Cushman, thence westerly through a fence and the middle of a brick partition wall to land of R. F. Evans *et als.* 34 88/100 feet, thence northerly along the outside of a wall 19 26/100 feet by land of said Evans *et als.* thence westerly ten feet by land of said Evans *et als.* by a line along outside of wall thence northerly by land of Timothy Kelleher by a line on a plan hereinafter mentioned to Allston street 84 40/100 feet thence easterly along the line of said Allston street 45 25/100 feet to the point of beginning: Containing 4,197 2/10 feet of land more or less, also a small parcel adjacent and lying southerly from said premises containing 52 8/10 feet and bounded northerly on said premises by a line through said fence 15 52/100 feet, westerly on other land of W. W. Warren estate not hereby conveyed by a line along the outer face-wall of the 14 wall on said adjoining land 4 92/100 feet, southeasterly by the passageway hereinafter mentioned 15 80/100 feet and easterly by said land now or formerly of E. Cushman by a line running through the middle of a brick partition wall 1 88/100 feet both of the above described parcels are shown on a plan of estate of W. W. Warren dated Oct. 23, 1890 and recorded Suffolk Deeds Libro

1978 page 288. On the same day I deposited an attested copy of this writ in the registry of deeds in the county of Suffolk with as much of my return thereon as relates to attachment of real estate, on the 3rd day of said September, at 10.35 o'clock a. m. I summoned the within named trustee Mechanics National Bank to appear and show cause at court as within directed by delivering in hand to Samuel A. Merrill its cashier an attested copy of this writ, on the 15th day of September 1892, I summoned the within named defendant to appear and answer at court as within directed by delivering to him in hand an attested copy of this writ.

Fees.

Attch'ts	$2.00
Copies	3.00
Services	1.00
Recording	.50
Travel	.24
	$6.74

FREDERICK P. KNAPP,
Deputy Sheriff.

HAMPSHIRE, ss:

SEPTEMBER 6TH, 1892.

By virtue of this writ I this day at 8 o'clock p. m. summoned the within named The Northampton Institution for Savings, to appear at court as within directed, by giving Lafayette Maltby, its treasurer an attested copy of this writ in hand.

Fees.

Service	.50
Travel	1.60
Copy	1.00
	$3.10

ANSEL WRIGHT,
Deputy Sheriff.

On said first Monday of October, A. D. 1892, the plaintiff appeared by T. J. McKay, his attorney and entered the above action and on, the third day of said October 1892, the following was filed, to wit:

15 SUFFOLK, ss:

Superior Court, October Sitting, 189–.

WETMORE, Pl'ff,
v.
KARRICK, D'f't.

In the above action I appear for the def't.
SHERMAN L. WHIPPLE.

On the fifth day of said October 1892, the following was filed, to-wit:

SUFFOLK, ss.

Superior Court, October Sitting, 189–.

CHAS. H. WETMORE, Pl'ff,
v.
JAS. L. KARRICK, D'f't.

In the above action I appear from the Northampton Institution for Savings, trustee.
SHERMAN L. WHIPPLE.

And afterwards, to wit, on the eighth day of said October 1892, the following was filed, to wit:—

Superior Court, Oct. 8, 1892.

WETMORE
vs.
KARRICK.

In the above entitled action the plaintiff claims a trial by jury.
CHAS. H. WETMORE,
By J. T. McKAY.

And on the tenth day of said October 1892, the following were filed to wit:

16 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, ss:

Superior Court, October Term, 1892.

CHAS. H. WETMORE
v.
JAMES L. KARRICK & TR.

Answer of Alleged Trustee.

And now the Northampton Institution for Savings summoned as trustee of the principal defendant in the above entitled action, ap-

pears and makes answer that, at the time of the service of the plaintiff's writ upon him, he had not in his hands or possession any goods, effects or credits of the said defendant.

Wherefore he prays that he may be discharged, and for his costs.

NORTHAMPTON INSTITUTION FOR SAVINGS.
L. MALTBY, *Treasurer.*

Oct. 8, 1892.—Then the above named L. Maltby treasurer made oath that the foregoing answer subscribed by him is true, before me.

S. D. DRURY,
Justice of the Peace.

SUFFOLK, *ss:*

Superior Court, October Sitting, 1892.

C. H. WHETMORE, Pl'ff,
v.
J. L. KARRICK, D'f't.

In the above action I appear for Mechanics' Nat. Bk. trustee.

H. M. BURTON, 50 *State St.*

On the tenth day of said October 1892, no answer having been filed herein for said trustee Mechanics national bank a default was thereupon entered against it.

And on the second day of November, in said year, the following was filed, to wit:

17 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court, October Sitting, 1892.

WETMORE
v.
KARRICK & TRUSTEE.

Defendant's Answer.

Now the defendant comes, and for answer denies each and every item, count and allegation in the plaintiff's writ and declaration contained as fully and specifically as if each item, count and allegation were separately denied.

And further answering the third count of the plaintiff's declaration, the defendant denies that he ever made or signed a promissory note, a copy whereof is annexed to the plaintiff's declaration, and marked "C," and he denies the genuineness of the signature of said note, and demands the plaintiff to prove the same at the trial.

And further answering said third count, the defendant says that if he ever made and signed any promissory note, a copy whereof is annexed to the plaintiff's declaration, marked "C," it was for the personal accommodation of the plaintiff, and upon the agreement and stipulation that the plaintiff should never assign to another or collect the same.

And further answering said third count, the defendant says that if he ever made and delivered said note, he has fully paid the same, and owes him nothing on account thereof.

And further answering all the counts of the plaintiff's declaration, the defendant says that there has been an accord and settlement and mutual satisfaction of all claims between the plaintiff and the defendant prior to the bringing of this suit.

JAMES L. KARRICK,
By His Attorney, SHERMAN L. WHIPPLE.

Thence the case was continued from sitting to sitting to the April sitting 1893, when on the fifth day of June, in said year, the following were filed, to wit:—

18 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Superior Court.

CHAS. H. WETMORE
vs.
JAMES L. KARRICK and TRUSTEE.

Motion to Amend Answer.

Now the defendant comes and moves to amend his answer in the above entitled cause by adding thereto the following:

And further answering the defendant says that if he ever signed the promissory note a copy whereof is annexed to the plaintiff's declaration marked "C," said promissory note was wholly without consideration and is void as between the parties thereto; that the same was given as a receipt for the promissory note of the plaintiff for an equal amount, of even date therewith, given by the plaintiff to the defendant; that the parties thereafter agreed that said notes should cancel and off-set each other and be mutually returned to the makers thereof; that the defendant has been ever ready and willing to make said return, but the plaintiff has failed so to do. And the defendant owes the plaintiff nothing on account of said note.

By His Attorney, SHERMAN L. WHIPPLE.

Endorsed on which said amended answer is the following, to wit:—

This may be filed. George R. Swasey, pl'ff's att'y.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.*:

Superior Court.

CHAS. H. WETMORE
vs.
JAMES L. KARRICK and TRUSTEE.

Declaration in Set-off.

First count. The defendant says that the plaintiff made a promissory note payable to the order of the defendant, a copy whereof is hereto annexed marked "A," and the plaintiff owes the defendant the amount of said note and interest thereon.

Second count. The defendant says that the plaintiff made a certain promissory note payable to the order of the defendant, 19 a copy whereof is hereto annexed marked "B," and the plaintiff owes the defendant the amount of said note and interest thereon.

Third count. The defendant says that he entered into a certain agreement in writing with the plaintiff, a copy whereof is hereto annexed marked "C," and the defendant has kept and fulfilled all the stipulations of said contract on his part to be kept and fulfilled; but the plaintiff wholly failed to keep, fulfill and discharge the stipulations and agreements contained in said contract by the plaintiff to be performed and fulfilled, to the great damage of the defendant.

By His Attorney, SHERMAN L. WHIPPLE.

"A."

$2182. BOSTON, 11*th February*, 1892.

For value received, I, Charles H. Wetmore, promise to pay to James L. Karrick, or order, the sum of twenty-one hundred & eighty-two dollars in one (1) month—from this date, with interest to be paid—at the rate of — per centum per — during said term, and for such further time as the said principal sum, or any part thereof shall remain unpaid.

Signed in presence of
(Signed) CHARLES H. WETMORE.

[On the margin:] Secured by mortgage of personal property in Chelsea & Boston to be recorded in — clerk's office at Boston.

"B."

$4000. BOSTON, 11*th February*, 1892.

For value received, I, Charles H. Wetmore, promise to pay to James L. Karrick, or order, the sum of four thousand dollars in

three (3) months from this date, with interest to be paid—at the rate of — per centum per — during said term, and for said further time as the said principal sum, or any part thereof shall remain unpaid.

Signed in presence of
(Signed) CHARLES H. WETMORE.

[On the margin:] Secured by mortgage of personal property in Chelsea & Boston, to be recorded in clerk's office in Boston.

"C."

This agreement made this eleventh day of February, 1892, by and between James L. Karrick of Boston and Charles H. Wetmore of Boston, witnesseth:

All former agreements are annulled and void. Now in consideration of these presents the said Wetmore agrees to finish the
20 three apartment houses on the lot of land at the corner of Dudley and Greenville Sts., Roxbury, according to the plans drawn by Wait & Cutler, the buildings are to be finished in the manner usual to first class building of this class, with all modern improvements, steam heating, plant and all work and material to be of the best quality and workmanship. Said Wetmore agrees to push the work continually and with all possible despatch and to finish same on or before May 1st, 1892. The said Karrick agrees to loan or advance to said Wetmore in the manner hereinafter set forth the the following sums of money: When the first floor is on and completed of the building on the corner of Dudley and Greenville Sts. $200.00, when the 2nd floor is on $425.00, when the third floor is on $450.00, when the fourth floor is on $450.00, when the roof is on $600. Also on the building next to Hotel Dearborn on Dudley St., when the 3rd floor is on $450.00, when the fourth floor is on $450.00, when the roof is on $600. Also when the buildings above mentioned are ready to plaster $700. on each, when plastered and windows hung $950.00 on each, when standing finish is up $600. on on each, when plumbing is complete, doors hung and floors laid, $1050.00 on each, when finished and ready for occupancy $950.00 on each, and thirty days after completion $1350.00 on each. Also on the Greenville St. house, when plastered and windows hung $950.00, when standing finish is up $450.00, when plumbing in in, doors hung and floors laid $1100.00, when completed $950.00 and thirty days after completion $1350.00. Provided always however and these presents are upon condition that said Karrick shall not be required to advance any sum while any sums are due him from Wetmore for insurance, bills, expenses or money advanced, or for any reason whatever, nor shall Karrick be required to advance any sum until an equal amount has been paid to him by Otis Shepard on an agreement between said Shepard and Albert J. West, which agreement has been transferred to Karrick by West. This agree-

ment is also subject to every condition and in every way to that agreement between Shepard and West.

Witness our hands and seals the day and year above first mentioned and to a like agreement.

CHARLES H. WETMORE.
JAMES L. KARRICK.

Endorsed on which said declaration in set-off is the following, to-wit:—

This may be filed. George R. Swasey, pl'ff's att'y.

On the seventh day of said June, 1893, the following was filed, to wit:—

21 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Superior Court.

CHARLES H. WETMORE }
vs. }
JAMES L. KARRICK. }

Sixth count. The plaintiff says that in February, 1892, he was the owner of land corner of Dudley and Greenville streets in Boston, and was erecting thereon three double houses under and in pursuance of a contract with one A. J. West, by which said West was obliged to advance to the plaintiff $30,000; that said West was secured for said advances by a mortgage for $70,000 given him by plaintiff on said land; that the defendant succeeded to and assumed the obligations of said West in said contract relating to said advances; that the plaintiff had no means to build said houses other than the money to be advanced under said contract; that on or about February eleventh, 1892, the defendant proposed the making of a new agreement as to the money remaining to be advanced under the said West contract so assumed by the defendant, which remaining advances were about $24,000, and in consequence thereof, it was agreed between plaintiff and defendant, that if the plaintiff would give the defendant two mortgages, one for $4,000 and one for $2,182, upon certain personal property owned by the plaintiff, the defendant would advance the $6,182, so to be secured by said mortgages, as the plaintiff might need it in the construction of said houses, and would advance the balance of said $24,000 or thereabouts, after deducting said $6,182 in the manner agreed upon in the contract, a copy of which is hereto annexed marked "A," the defendant being at the time further secured as to the advancing of said money by an assignment from said West of the $70,000 mortgage on said land and buildings. And the plaintiff says he did give the two mortgages, and that, thereupon, the defendant agreed to advance said

$6,182, as needed by the plaintiff, and that the contract as to the balance of said $24,000 or thereabouts, was then entered into and agreed to as a part of said transaction and contract.

And the plaintiff says his only means of obtaining money to complete said houses, and keep and perform his obligations under said second mortgage which had been assigned to the defendant, was by and through the faithful performance by the defendant of the contract so made on or about February 11th, aforesaid; that by reason of giving said two mortgages on said personal property, the plaintiff had exhaused his only remaining means of raising money, and that his means and credit were not such as to enable him to obtain material and labor on credit; that the defendant, well knowing all the foregoing premises, broke and failed to keep his said contract
22 of February 11th, and that, in consequence of said failue and breach, the plaintiff was unable to finish said houses, and was unable to earn the payments which would have enured to him under said contract.

And the defendant wrongfully claiming a breach of the condition of said second mortgage for $70,000, (said breach, if any there was, was owing to and in consequence of the breach of the defendant's agreement of said February 11th,) entered and foreclosed under said second mortgage, and the plaintiff, in consequence of said above mentioned wrongful acts of the defendant, lost all that he had put into said houses, and the profits which would have accrued to him, had the defendant kept his said contract.

By His Attorney, GEORGE R. SWASEY.

Endorsed whereon is the following, to wit:
"This may be filed. Sherman L. Whipple, def't's att'y."

And on the eighth day of said June 1893, the following were filed, to-wit:—

SUFFOLK, *ss*:

Superior Court.

CHAS. H. WETMORE
vs.
JAMES L. KARRICK.

Plaintiff's Demurrer to Defendant's Declaration in Set-off.

Now comes the plaintiff and demurs to the defendant's declaration in set-off and assigns as causes of demurrer the following:

1st. As to all the counts of the said declaration in set-off, he says they cannot be allowed in this action except as the first 2 counts of said declaration in set-off may be set off against the 3rd and 5th counts of plaintiff's declaration.

2nd. As to the last count of said declaration in set-off, the plaintiff

says it is not a proper matter to be set off as against any count of the plaintiff's declaration.

By His Att'y, GEO. R. SWASEY.

I hereby certify that I am of the opinion that there is such probable ground in law for said above demurrer as to make it a fit subject for judicial inquiry and trial, and that said demurrer is not intended for delay.

GEO. R. SWASEY,
Plaintiff's Attorney.

On which said demurrer is the following endorsement by the court, to-wit:—

"Demurrer to third count in set-off sustained."

23 SUFFOLK, *ss*:

Superior Court.

CHAS. H. WETMORE
vs.
JAMES L. KARRICK.

Plaintiff's Answer to Defendant's Declaration in Set-off.

Now comes the plaintiff, and without waiving his demurrer to said declaration in set-off, for answer denies each and every allegation in each of the counts of said declaration in set-off contained.

By His Attorney, GEO. R. SWASEY.

And thereafterwards, to wit:—on the thirteenth day of said June 1893, the following questions were framed for the jury and were answered by them as follows, to wit:—

SUFFOLK, *ss*:

Superior Court.

WETMORE
vs.
KARRICK.

Ques. 1. Had the defendant advanced to the plaintiff on or before March 3 1892, an amount equal to the amount which Shepard had paid to the defendant? Ans. Yes.

2. On March 3, 1892, were there any sums due from the plaintiff to the defendant for insurance, bills, expenses or money advanced? Ans. No.

3. Did the defendant on February 11, 1892, make an oral agreement with the plaintiff to advance to the plaintiff $6182 upon the two personal mortgages given by the plaintiff to the defendant, as the plaintiff might need the advance in the construction of said building? Ans. Yes.

4. What was the amount of the defendant's advances to, or for the benefit of the plaintiff, before March 3, 1892, under the written contract between the parties under date of February 11, 1892?

And did those advances equal the amount which the plaintiff was entitled to, *rendered* by the progress he had made upon said houses? Ans. No.

FRANK W. BROAD,
Foreman of the Jury.

Thence the case was continued to the July sitting 1893, when on the twenty-seventh day of said July 1893, the following was filed, to-wit:—

24 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court, July Sitting, 1893.

WETMORE
vs.
KARRICK.

Motion to Have Verdict Ordered for Defendant.

Now the defendant comes and moves in the above entitled case that judgment be ordered for the defendant.

By His Attorney, SHERMAN L. WHIPPLE.

And also, to wit, on said twenty-seventh day of said July 1893, the following was filed, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court, August Sitting, 1893.

WETMORE
vs.
KARRICK.

Now the defendant comes and moves that the special findings of the jury in the above entitled case be set aside.

By His Attorney, SHERMAN L. WHIPPLE.

Endorsed on which said motion is the following, to wit:
"Motion allowed. A. M."

Thence the case was continued from sitting to sitting to the January sitting, 1894, when on the twelfth day of February, in said year, the following was filed to wit:

SUFFOLK, *ss* :

Superior Court.

CHARLES H. WETMORE
vs.
JAMES L. KARRICK.

Seventh Count of Plaintiff's Declaration.

The plaintiff says that on February 11th, 1892, he was the owner of a certain parcel of land at the corner of Dudley and Green-
25 ville streets, in Boston, and was erecting thereon three double apartment houses; that the defendant prior to said date had been advancing the plaintiff money for the erection of said houses under an agreement relating thereto; that on or about February 11th 1892, the defendant proposed to the plaintiff the making of a new agreement as to advances to be made to the plaintiff for the completion of said houses, and in consequence thereof it was agreed between the plaintiff and the defendant that if the plaintiff would give to the defendant two mortgages, one for four thousand (4000) dollars and one for two thousand one hundred and eighty-two (2182) dollars upon certain personal property and would execute the contract, a copy of which is hereto annexed, marked A, the defendant would advance to the plaintiff or pay for his benefit about six thousand one hundred and eighty-two (6182) dollars as the plaintiff might need said advances and payments in the construction of said houses and would advance to the plaintiff certain other moneys in the manner mentioned and agreed upon in the contract, a copy of which is hereto annexed marked A. And the plaintiff says he did give two mortgages upon certain personal property and did execute a contract, a copy of which is hereto annexed marked A, and thereupon the defendant agreed to advance to the plaintiff or to pay for his benefit about six thousand one hundred and eighty-two (6182) dollars as the plaintiff might need said advances and payments in the construction of said houses and to advance to the plaintiff certain other moneys in the manner mentioned and agreed upon in the contract, a copy of which is hereto annexed marked A.

And the plaintiff says that his only means of obtaining money at said time, namely, February 11th, 1892, to complete said houses and to keep and perform his obligations under a certain mortgage on said premises—given by him to one West—was by and through the faithful performance by the defendant of the contract so made on or about February 11th, aforesaid; that by giving two said mortgages on said personal property to the defendant the plaintiff exhausted his only remaining means of raising money, and that his means and credit were not such at that time as to enable him to obtain material and labor on credit; that the defendant well knowing all the foregoing premises at the time of making

said contract of February 11th and knowing of the existence on said mortgage on said premises, broke and failed to keep his said contract of February 11th, and without the knowledge of the plaintiff obtaining an assignment of the said Wetmore-West mortgage on said premises, and that in consequence of said failure and breach by the defendant of his said contract the plaintiff was unable to finish said houses; and the defendant wrongfully claiming a breach of the conditions of said Wetmore-West mortgage, of which he had obtained an assignment unbeknown to this plaintiff, entered upon said premises, excluded the plaintiff therefrom and purported to foreclose the said mortgage for an alleged breach of the conditions of the same; and the plain-
26 tiff says that said breach of said mortgage, if any there was, was because of the failure of the defendant to keep his said contract of February 11th, and in consequence of said breach by the defendant of his said contract, and because of his wrongful claim of a breach of the conditions of said mortgage and because of his wrongful exclusion of the plaintiff from the premises, and because of his wrongful purported foreclosure of said mortgage, the plaintiff was unable to complete said houses and lost in consequence thereof the large profits and returns which would have enured to him had the defendant kept his said contract.

By Plaintiff's Attorney, GEORGE R. SWASEY.

On which said motion is the following endorsement by the court, to wit:—

"Allowed."

Whereupon upon the twenty-first day of said February 1894, the cause after a full hearing was submitted to a jury, sworn to try the same and the following questions were also submitted and were answered and returned into court with their verdict as follows, to wit:

SUFFOLK, *ss:*

Superior Court.

CHARLES H. WETMORE
vs.
JAS. L. KARRICK.

Question for the Jury.

What amount is included by the jury in the assessment of damages on account of the value added by the plaintiff to the premises, by reason of materials used and labor furnished in the erection of said buildings, which were not furnished or paid for by the defendant, including the value resulting from the use of said mortgaged personal property in excess of the amount paid by the defendant, for, or on account of said personal property?

The jury answer.
Eight thousand four hundred and twelve dollars and twenty-eight cents.

JOHN W. ALLISON,
Foreman of the Jury.

27 SUFFOLK, *ss:*

The Superior Court, January Sitting, A. D. 1894.

CHARLES H. WETMORE, Pl'f,
vs.
JAMES L. KARRICK, D'f't.

The jury find for the plaintiff, and assess damages in the sum of nine thousand one hundred and sixty-nine dollars and thirty-nine cents.

JOHN W. ALLISON,
Foreman of the Jury.

Whereupon, on the twenty-third day of said February, 1894, the following was filed, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, *ss:*

Superior Court, February Sitting, 1894.

WETMORE
vs.
KARRICK.

Now the defendant comes and moves that the date for filing his exceptions in the above entitled case be extended so that the same may be filed at any time on or before March 5th, 1894.

By His Attorney, SHERMAN L. WHIPPLE.
GEORGE R. SWASEY,
For Plaintiff.

Upon which said motion is the following endorsement by the court, to-wit:
"Allowed."

And on the twenty-fourth day of said February 1894, the following is filed, to wit—

28 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss.:

Superior Court, February Sitting, 1894.

WETMORE
vs.
KARRICK.

Now the defendant comes in the above entitled case, after verdict for the plaintiff, and respectfully moves that the verdict be set aside and a new trial of the case granted upon the following grounds, to wit:

1st. That the verdict is against the evidence and the weight of evidence.

2nd. That the damages awarded are excessive.

3rd. On account of improper, erroneous and misleading statements made by plaintiff's counsel in argument.

4th. On the ground of evidence newly discovered since the trial of said case and not known to defendant or defendant's attorney until after the trial of the case, on the question of liability, as appearing in the affidavit hereto annexed.

By His Attorney, SHERMAN L. WHIPPLE.

I, John S. Lamprey, being duly sworn, hereby depose and say that sometime in the winter of 1892, Charles H. Wetmore of Boston came to my office and stated that he could not go on with his contract on the buildings at the corner of Dudley and Greenville streets; that the mortgagee was either in possession or about to take possession for the purpose of foreclosure; that he had given a mortgage and later a bill of sale of certain personal property, consisting chiefly of a large number of brick sold to him by Anderson, and then located, for the most part, at Mystic wharf, to James L. Karrick upon the consideration that Karrick would pay the freight charges and cartage of brick from the wharf to the houses on Dudley and Greenville streets; that he believed the personal property exceeded in value the amount that Karrick would have to pay for freight and cartage and Wetmore requested me to visit Karrick and ask him if he would not pay to Wetmore whatever the property proved to be worth above the cost of freight charges and cartage. Said Wetmore did not at any time in the interview claim that Karrick was to advance any money on the mortgages or on the brick except for the purpose of paying freight charges and cartage. I thereupon called on Mr. Karrick at his office in the Ames building and made the request which Wetmore desired me to make, and Karrick stated that he had already paid on account of the brick more than
29 their value and for that reason would not comply with Wetmore's request. I subsequently reported this interview to Wetmore.

JOHN S. LAMPREY.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

FEBRUARY 24, 1894.

Personally appeared the above named John S. Lamprey and made solemn oath that the foregoing affidavit by him subscribed is true, before me.

ROBERT W. FROST,
Justice of the Peace.

Endorsed on which said motion is the following, to wit:
"Boston, Mar. 3/94. Motion overruled. Daniel W. Bond, J. S. C."

And thereupon, said defendant, by his said attorney alleged sundry exceptions to the ruling and opinion of the court in certain matters of law, which were rduced to writing, as on file.

Thence the case was continued from sitting to sitting to the April sitting 1897, when on the eighth day of June, in said year, at a calling of the docket under the general order of court this action was dismissed.

On the tenth day of said June, 1897, said dismissal was stricken off and thereafterwards, to wit:—on the twenty-eighth day of said June 1897, the following was filed, to wit:—

SUFFOLK, *ss*:

Superior Court, Sitting 1897,

WETMORE, Pl't'ff,
vs.
KARRICK, Def't.

In the above action please withdraw my appearance for the defendant Karrick.

SHERMAN L. WHIPPLE.

Thence the case was contiued from sitting to sitting to the April sitting 1898, when on the thirteenth day of June, in said year, the following was filed, to wit:—

30 SUFFOLK, *ss*:

Superior Court.

WETMORE
vs.
KARRICK.

I hereby withdraw as attorney for the defendant.

E. B. GOODSELL.

Thence the case was continued to the July sitting 1898, when said exceptions, having been presented to the court, were disallowed as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the qustions of law raised by the defendant's exceptions.

Thence the case was continued from sitting to sitting unto the April sitting 1899, when on the twelfth day of June, 1899, at a calling of the docket under the general order of court, said action was dismissed.

And now at this present October sitting, 1900, to wit, on the eighteenth day of said October 1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year but not discovered.

And thereafterwards, to wit: on the tenth day of November, 1900, the following is filed, to wit:

SUFFOLK, *ss*:

Superior Court.

CHARLES H. WETMORE
vs.
JAMES L. KARRICK and TRS.

In the above entitled cause the alleged trustee, the Northampton Institution for Savings is hereby discharged.

GEORGE R. SWASEY,
Att'y for Pl'ff.

November 10, 1900.

And on the seventeenth day of said November 1900, the following is filed, to wit:

31 SUFFOLK, *ss*:

Superior Court.

CHARLES H. WETMORE
vs.
JAMES L. KARRICK.

Motion for Judgment.

Now comes the plaintiff in said case after verdict in the same and moves that judgment be entered on the verdict in said case.

By His Attorney, GEORGE R. SWASEY.

Endorsed on which said motion is the following, to wit:

"Motion all'd and judgment ordered on verdict. Nov. 20, 1900."

Whereupon judgment is entered accordingly.

It is therefore considered by the court on said twentieth day of November, A. D. 1900, that said Charles H. Wetmore, plaintiff as

aforesaid recover against said James L. Karrick, defendant as aforesaid the sum of twelve thousand eight hundred eighty-one dollars and forty-six cents damages and costs of suit taxed at forty dollars and forty-six cents.

And execution is awarded for the same sums against the goods, effects and credits of the said defendant in the hands and possession of the said Mechanics national bank, trustee as aforesaid.

It is further considered by the court on the day and year aforesaid that said Northampton Institution for Savings, trustee as aforesaid, recover against said Charles H. Wetmore, plaintiff as aforesaid its costs of suit taxed at seven dollars and sixty-four cents.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said superior court to be hereto affixed.

Witness, Albert Mason, Esquire, chief justice of our said superior court, at Boston, in said county of Suffolk, this twenty-fourth day of November, in the year of our Lord one thousand nine hundred.

[SEAL.]

Att. JOS. A. WILLIARD, *Clerk.*

32 *Demurrer.*

Filed February 20, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to Use of John F. McKay, Plaintiff,
vs.
JAMES L. KARRICK, Defendant.
} At Law. No. 46600.

The defendant James L. Karrick, through his attorneys J. J. Darlington and Millan & Smith demurs to the declaration filed herein and says that it is bad in substance.

J. J. DARLINGTON,
MILLAN & SMITH,
Att'ys for Defendant.

NOTE.—One of the matters of law intended to be argued in support of this demurrer is that the court was without jurisdiction to render the judgment in the declaration referred to, because the case was restored to the docket after the end of the term in which judgment of dismissal had been entered therein.

J. J. DARLINGTON,
MILLAN & SMITH,
Att'ys for Defendant.

Mr. William L. Ford, attorney for the plaintiff:

Please take notice that the above demurrer has been set
33 down for hearing in circuit court No. 2, and will be called for argument before Chief Justice Clabaugh on Friday, March 4, 1904, at ten o'clock, a. m., or as soon thereafter as counsel can be heard.

J. J. DARLINGTON,
MILLAN & SMITH,
Att'ys for Defendant.

Demurrer Overruled.

Supreme Court of the District of Columbia.

THURSDAY, *June 23rd*, 1904.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.

* * * * * * *

BERTON O. WETMORE, Adm'r, &c., Pl'tff,
vs.
JAMES L. KARRICK, Defendant. } At Law. No. 46600.

Upon consideration of the demurrer of defendant filed herein by his attorneys, to the declaration, it is ordered that the said demurrer be and the same is hereby overruled. The defendant is hereby granted leave to have twenty days, within which to plead.

34 *Pleas, Affidavit of Defense.*

Filed July 13, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the Use of John F. McKay,
vs.
JAMES L. KARRICK. } At Law. No. 46600.

I.

The defendant for plea to the plaintiff's declaration says that there is no such record of a judgment as in the declaration set out.

II.

For a further plea to plaintiff's declaration the defendant says that heretofore on to wit the 12th day of June, 1899, the action brought by the plaintiff's intestate Charles H. Wetmore in the

superior court within and for Suffolk county, Massachusetts, mentioned in the declaration was dismissed and stricken off the docket of said court at a calling of said docket under order of the court, and that said dismissal became final under the rules of said court on the first Monday of July 1899; that said cause remained so dismissed from the said 12th day of June, 1899, for a long time thereafter, namely until the 18th day of October, 1900, which was for more than five terms or sittings of said court; that on to wit the 26th day of April, 1899, this defendant filed his petition in bankruptcy in the district court of the United States for the district of Colorado, duly scheduling the debt due the said Charles H. Wetmore, which is the foundation of the said alleged judgment upon which this suit is based, and on to wit the 23rd day of June, 1899, while the said action was so stricken from the docket of the superior court of Suffolk county, Massachusetts, and was so finally dismissed by said court, the defendant was duly discharged in bankruptcy by the said district court of the United States for the district of Colorado from all debts provable in bankruptcy on the day of the filing of said petition; which debts included the debt due to said Wetmore; and that subsequently to the said discharge in bankruptcy, and while the said action in the superior court of Suffolk county, Massachusetts, stood dismissed as aforesaid, this defendant made inquiry of the clerk, of said superior court as to the status of said case, and was told that the same was dismissed and no longer pending against him; that relying upon said dismissal he took no step to suggest his bankruptcy in said suit, and that thereafter, to wit on the 18th day of October, 1900, as
35 shown by the record of said superior court, the said action was attempted to be restored to the docket of said court, without summons, citation or notice of any kind to this defendant, or to any one for him, and without his knowledge; and that in pursuance of such attempted restoration, to wit, on the 20th day of November, 1900, without notice of any kind to this defendant or to any one representing him, judgment was assumed to be rendered in said cause and that said judgment is the judgment here sued upon; that said judgment has no other foundation than said attempted restoration of the said cause to the docket of said superior court of Suffolk county, Massachusetts, under the facts and circumstances above set forth, all of which, including the rendition of such judgment, were made without the service of process or other notice on this defendant or upon any one for him, and without his knowledge, and without any jurisdiction of the court in the premises to render said judgment to his wrong and injury.

J. J. DARLINGTON,
MILLAN & SMITH,
Attorneys for Defendant, James L. Karrick.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the use of John F. McKay,
vs.
JAMES L. KARRICK.
} At Law. No. 46600.

Affidavit.

DISTRICT OF COLUMBIA, *ss:*

James L. Karrick, being duly sworn, upon his oath says: I am defendant in the above entitled cause, in which John F. McKay is the use plaintiff and Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, is the nominal plaintiff; that I have a just defense to said suit, based upon the following facts: The suit brought by the plaintiff is founded upon an alleged judgment of the superior court of Suffolk county, Commonwealth of Massachusetts, which said alleged judgment arose out of the state of facts hereinafter detailed. On or about September 2, 1892, an action was brought by Charles H. Wetmore, the intestate of the nominal plaintiff, against affiant, in the said superior court of Suffolk county Massachusetts. Various steps were taken in said cause from time to time, as the suit proceeded, and on or about June 12, 1899, the action was dismissed by the judge presiding in said court, because the same was not prosecuted in accordance with the rules of said court made in pursuance of law; that under a rule of said court, in effect at the time, the said dismissal judgment became final on
36 the first Monday of the following month; that on or about April 26, 1899, affiant filed his petition in bankruptcy in the district court of the United States for the district of Colorado, sitting at Denver in the State of Colorado, duly scheduling the indebtedness of the said Charles H. Wetmore which is the basis of the judgment here sued upon, and on or about the 23rd day of June, 1899 I was discharged in bankruptcy by a decree of said district court, from all claims provable under the act relating to bankruptcy, which existed on the said 26th day of April, 1899, of which claims the indebtedness due the said Charles H. Wetmore was one, it being a claim proper to be proved under said act; that thereafter and before the rendition of the said alleged judgment in said cause, affiant went to the city of Boston and to the court house therein and made inquiry of the clerk of the said court, or of one of his deputy clerks, as to the status of said suit and was informed that the cause was no longer pending and that it had been dismissed for want of prosecution; that thereafter, the said action was without citation summons or notice of any kind to affiant, or to any one representing him, restored to the docket of the said court, and on or about November 17, 1900, still without notice to affiant or any one repre-

senting him, a judgment was entered in the cause against affiant for the sum of $12,881.46 and the costs of suit; that it was not until after affiant was served with summons in this action in the District of Columbia, that he had any idea or intimation that the cause was pending against him in the superior court of Suffolk county, Massachusetts, or that it had been restored to the docket of said court; affiant says that the failure to notify him of the contemplated restoration of the case to the docket of the Massachusetts court and his utter ignorance that such action had been taken, worked upon him a great hardship, as had he been notified of any such purpose to restore the case to the docket he would have been able to protect himself by filing a suggestion of his discharge in bankruptcy, and would have done so; but by being kept in ignorance of such proposed action he had no opportunity to avail himself of the right to plead his bankruptcy as a complete bar to further proceedings in the cause.

JAMES L. KARRICK.

Subscribed and sworn to before me this 13th day of July, 1904.
[SEAL.] ALBERT E. SHOEMAKER,
Notary Public, D. C.

37 *Joinder in Issue.*

Filed July 23, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the Use of John F. McKay, Plaintiff,
vs.
JAMES L. KARRICK, Defendant. } At Law. No. 46600.

The plaintiff joins issue on the defendant's first plea to the plaintiff's declaration.

WM. L. FORD,
Attorney for Plaintiff.

Demurrer.

Filed October 22, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the Use of John F. McKay, Plaintiff.
vs.
JAMES L. KARRICK. } At Law. No. 46600.

The plaintiff says that the defendant's second plea is bad in substance.

WM. L. FORD,
Attorney for Plaintiff.

NOTE.—Among the points to be argued in support of the foregoing demurrer are:

First. That the jurisdiction of the Massachusetts court over the original suit and the parties thereto, and the power of said court to render judgment sued on herein, were in no way affected by the institution of the bankruptcy proceedings by the defendant, his adjudication as a bankrupt and his discharge prior to the rendition of said judgment by said court.

Second. That the defendant's discharge in bankruptcy having been granted before the rendition of the judgment sued on herein, does not constitute a defense, and cannot properly be pleaded as a defense, to this suit.

Third. That the defendant was not entitled to notice of the restoration of the original suit to the docket of the Massachusetts court, the said suit having been inadvertently dismissed
38 through a mistake of fact of said court, and restored to the docket by said court for reasons apparent of record, no new thing being brought upon the record.

WM. L. FORD,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

THURSDAY, *December* 29, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

BERTON O. WETMORE, Adm'r, Plaintiff,
vs.
JAMES L. KARRICK, Defendant. } At Law. No. 46600.

Upon hearing the demurrer of the plaintiff to the second plea of the defendant, it is considered that said demurrer be, and hereby is sustained.

Opinion on Demurrer to 2nd Plea.

Filed December 29, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator,
vs.
JAMES L. KARRICK, } #46600. Law.

In this case the declaration is based on an alleged judgment rendered in the superior court for the county of Suffolk in the State of Massachusetts. A certified copy of the judgment is filed as "Exhibit A," and made part of the declaration.

The defendant has filed two pleas, the first, *nul tiel record*, about which no question now arises: and second, a special plea to which the plaintiff has filed a demurrer.

By the second plea the defendant avers that on June 12th, 1899, the action brought by plaintiff's intestate in the said superior court, was dismissed and stricken off the docket at a calling of said docket under order of the court; and that, said dismissal became final under the rulings of said court, on the first Monday of July 1899; that said cause remained so dismissed until October 18th, 1900, more than five terms or sittings of the said court; that April 26th, 1899, the defendant filed his petition in bankruptcy in the district court of the United States for the district of Colorado, duly scheduling the debt due plaintiff's intes-
39 tate, Charles H. Wetmore, which is the foundation of said alleged judgment upon which this suit is based; and on June 23rd, 1899, while said action was so stricken from the docket, and was so finally dismissed, the defendant was duly discharged in bankruptcy by said court in Colorado, from all debts provable, including the said debt to said Wetmore; and thereafter, and while the said action in said superior court stood dismissed, the defendant made inquiry of the clerk of said court, and was told that the same was dismissed; and, relying upon said dismissal he took no steps to suggest his bankruptcy in said suit; and that thereafter, to wit, October 18th, 1900, the said action was attempted to be restored to the docket of said court, without summons, citation, or notice of any kind to him, or to any one for him, and without his knowledge; and in pursuance of such attempt, and without notice, judgment was assumed to be rendered in said cause on November 20th, 1900; and that said judgment is the judgment sued upon; and that said judgment has no other foundation than said attempted restoration of the said cause to the docket as above set forth; and was rendered without any jurisdiction of the said court in the premises.

The plaintiff states that among the points to be argued in support of the demurrer to this plea, are first, that jurisdiction of the Massachusetts court, and the power of said court to render the judgment sued on, were not affected by the alleged bankruptcy proceedings; second, that the defendant's discharge in bankruptcy, having been granted before the rendition of the judgment, the same cannot properly be pleaded as a defense to this action; and third, that the defendant was not entitled to notice of the restoration of the original suit to the docket of the Massachusetts court, because it had been inadvertently dismissed through the mistake of the court, and had been restored to the docket for reasons appearing on the face of the record, no new thing having been brought before the court.

It appears by the certified copy, or transcript from the proceedings of the Massachusetts court, filed with the declaration, that a jury trial had been had at the January sitting, 1894, and a verdict rendered in favor of the plaintiff; that a motion for a new trial was filed, based on several grounds, which was overruled on March 3d,

1894; and thereafter, the defendant alleged sundry exceptions to the rulings and opinions of the court in certain matters of law, which were reduced to writing, as on file; and the case was then continued until the April sitting, 1897, when the action was dismissed, on June 8th, but on June 10th, the dismissal was stricken out; and thereafter other proceedings were had, namely, one of the attorneys for the defendant filed a præcipe, withdrawing his appearance, and the case was continued from sitting to sitting to the April sitting, 1898, when on the 13th day of June, another of the attorneys for the defendant filed a præcipe, withdrawing his appearance; and
40 thereupon, the case was continued to the July sitting, 1898, when said exceptions, having been presented to the court, were disallowed, and the case was then continued from sitting to sitting, until June 12, 1899, when, on the call of the docket, the action was dismissed.

The record then states that at the October sitting, 1900, to wit, on October 18th, 1900, said order of dismissal was stricken out, and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered; and thereafterwards, on November 17th, 1900, the plaintiff moved for judgment on the verdict in said cause; and on November 20th, 1900, the motion was allowed, and judgment ordered on verdict; and judgment was thereupon entered for the recovery of $12,881.46, and costs of suit, taxed at $40.46; and also a judgment of condemnation, as to credits in the hands of the Mechanics national bank, trustee.

The attorneys for the defendant contend that the judgment of the said superior court, by reason of the facts stated in their second plea, is absolutely void; and their claim is based on the argument that the court lost jurisdiction over the person of the defendant on June 12th, 1899, when judgment of dismissal was pronounced. They admit that if there is only *error* in the judgment, it cannot be inquired into collaterally in this proceeding; but if it is *void*, it cannot be made the foundation of a suit, and their plea must therefore be sustained.

The principal question then is, do the facts set forth in the plea, show that the court had lost jurisdiction? or are the orders, setting aside the judgment of dismissal, and bringing the case forward, and finally entering judgment on the verdict, nullities, or merely irregularities?

The transcript shows that jurisdiction was properly obtained and held to June 12th, 1899, over both the subject matter of the suit, and the person of the defendant; and it appears that by some rule of practice, the said superior court, when no action had been taken in a pending case for one year, might enter an order, *pro forma*, dismissing the case; and it is claimed in the present case that the order of June 12th, 1899, was inadvertently entered by the court, because, at that time, a proper inspection of the record would have shown that there was no authority or power in the court to grant such

order, or judgment, by reason of such general rule, as the case was not one coming within the provisions of such rule.

The argument of counsel for plaintiff is, that such order of dismissal, being erroneous because of a failure of the court to properly inspect its own record, that it is within the power of the court at any time thereafter, to correct such erroneous judgment of dismissal, by an order vacating the same, without notice, and that jurisdiction was never lost by such erroneous order of dismissal.

In Freeman on Judgment, section 142, the author states that:

"Jurisdiction over a party being obtained, continues until judgment; and he must therefore take notice of all the proceedings
41 until that time. After judgment he is not regarded as always present and under control of the court. * * * Various motions may be made and proceedings taken after final judgment, either to correct it by amendment, to vacate it for some error or irregularity, to avoid it by writ of error or appeal, or to control process issued for its enforcement. Of these proceedings, unless they necessarily result from a mere inspection of the record, the parties are entitled to notice; but such notice may generally be given to their attorneys; who notwithstanding the entry of judgment are regarded as still representing them for the purpose of receiving notice of motions."

While the transcript in this case shows no service of notice, either on the defendant or his attorneys, the record does not state any permission or order of the court for the withdrawal of the attorneys, although each filed a præcipe stating that he did withdraw from the case; and in the absence of some record to the contrary, this court might presume that such request for withdrawal was never allowed by the court, and that said attorneys therefore remained of record in said case; and if it was necessary in this case that notice of the motion to vacate the order of dismissal, should be served on them, or on the defendant, this court might presume that such service of notice was made upon said attorneys.

It is argued, however, by plaintiff's attorney, that no service of notice whatever, was necessary, for the reason that the defendant must be charged with notice of what the record showed at the time the order of dismissal was entered; and must have known, constructively, if not actually, that such order was irregular at that time; and being charged with such notice, he must also know that the court, on inspection of its own record, and discovering such error, could properly vacate such order of dismissal, and reinstate the case, and allow it to proceed to final judgment. This being so, the final judgment, even if irregular, is not void, and is not subject to attack in this suit.

There can be little question of the power of the court to correct any mistake made by the clerk in keeping its records, whether during the same term that the mistake occurs, or at any subsequent term. There are a number of cases that hold that when it clearly appears what judgment should have been rendered as of course upon

the facts in the record, the court will assume to treat the failure to render such judgment as a mere clerical misprision, and will amend the judgment, or correct it in such way as to make it conform to that which should have been rendered upon the facts. (15 Enc. Pl. and Pr., 214.)

This, it is said, is a power inherent in the authority of every court having general jurisdiction; and this power may be exercised by the court at any time when the error is brought to its attention. Again, it is said as between the original parties there is no limitations as to the time in which amendments may be allowed; and no reason suggests itself why amendment of the record may not
42 be made at any time, so long as anything definite and certain remains to amend by. (17 Enc. Pl. and Pr., 913–920.)

In the case of Palmyra (12 Wheaton, 1) Mr. Justice Story, pronouncing the opinion of the court, uses this language, on page 9:

"Every court must be presumsd to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake." That was a case where the clerk of the circuit court had failed to transmit a perfect record, and for want of such record the court had dismissed the appeal, and at a subsequent term a correected transcript having been presented, which would, if present at first, have prevented the dismissal, the court set aside such dismissal and reinstated the appeal.

The court having the inherent power to pass such an order, can it be said that the failure to give notice to either of the parties of its intention to exercise the same, is necessary to the exercise thereof? The authorities are not uniform on this point. It is proper and right that such notice should be giveu in order to prevent any injustice, but failure to give such notice, it seems to me, cannot deprive the court of its inherent control of its own records so as to make them conform to its own ruling, or to its intended judgment.

For the foundation of all such general orders of dismissal, the court is obliged to rely upon the accuracy of its recording officer to keep it informed of the condition of the record; and if the court acts on the assumption that the record states one fact, when it actually states another, which would require a different order to judgment, it can, with apparent good reason, attribute the erroneous order made to the mistake of the clerk, either in recording the minutes, or in reading the record.

I am constrained to hold that the setting aside of the judgment of dismissal by the said superior court, on October 18th, 1900, and the subsequent entry of judgment on the verdict in this case, were not void proceedings, but at most, were irregularities, which cannot be questioned or corrected in a collateral proceeding at law, even if they could have been set aside, on timely motion, by the court making the same, or would be considered and corrected by a court of equity.

I am therefore disposed to sustain the demurrer to the second plea, and it is so ordered.

JOB BARNARD, *Justice.*

43 *Allowance of Special Appeal.*

Filed January 9, 1905.

Court of Appeals of the District of Columbia, January Term, 1905.

JAMES L. KARRICK, Petitioner,
vs.
BERTON O. WETMORE, Administrator, to Use of John F. McKay.
No. 204, Original Docket. Law. No. 46600.

On consideration of the petition of James L. Karrick for the allowance of a special appeal from an order of the supreme court of the District of Columbia, entered herein on the 29th day of December, 1904, it is now here ordered by the court, that said appeal be, and the same is hereby, allowed.

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

January 6, 1905.

A true copy.
Test:
HENRY W. HODGES, [SEAL.]
Clerk of the Court of Appeals of the District of Columbia.

In the Supreme Court of the District of Columbia.

JAMES L. KARRICK
vs.
BERTON O. WETMORE, Adm'r, to Use of JOHN F. McKAY.
At Law. No. 46600.

The President of the United States to Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia, on the 29th day of December, 1904, wherein James L. Karrick — appellant, and you are appellee, to show cause, if any there be, why

the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 9th day of January, in the year of our Lord one thousand nine hundred and five.

Seal Supreme Court of the District of Columbia. 44

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 9th day of January, 1905.

WM. L. FORD,
Attorney for Appellee.

(Endorsed:) (9.) No. 46600. Law. James L. Karrick *vs.* Berton O. Wetmore, administrator, &c. Citation. J. J. Darlington, Millan & Smith, attorneys for appellant.

Memorandum.

January 11, 1905.—Appeal bond filed.

Directions for Preparation of Transcript.

Filed January 20, 1905.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, *vs.* JAMES L. KARRICK.	Law.	No. 46600.

The clerk of the supreme court of the District of Columbia:

In making up the transcript of the record to be transmitted to the Court of Appeals of the District of Columbia, on the special appeal of the defendant herein, you will include the following portions of the record, and none other, as necessary to the hearing of said appeal:

1. Original declaration and affidavit thereto attached, omitting the record of the judgment of the superior court of Suffolk county, Massachusetts, except as hereafter stated.

2. All that part of the record of the judgment of the superior court of Suffolk county, Massachusetts, filed with the declaration, from and including the finding of the jury on page 38, thereof to the end of said record.

3. The pleas of defendant, with affidavit thereto attached.
4. Demurrer to second plea.
5. Opinion of the court sustaining demurrer to the plea, and order thereon.
6. Order allowing special appeal.
7. Citation on appeal, with acknowledgment of service by plaintiff's attorney.
8. Note.—Appeal bond approved by the court, filed.
9. This memorandum and the acknowledgment of service thereof hereto attached.
10. The notice appended hereto to attorney for plaintiff of the parts of the record which you are to include in the transcript.

J. J. DARLINGTON,
MILLAN & SMITH,
Attorneys for Defendant.

Mr. William L. Ford, attorney for plaintiff:

Please take notice that we shall instruct the clerk of the supreme court of the District of Columbia to make up the transcript of the record in the above entitled cause, according to the above memorandum.

J. J. DARLINGTON,
MILLAN & SMITH,
Attorneys for Defendant.

I hereby acknowledge service of a copy of the foregoing memorandum.

WM. L. FORD,
Attorney for Plaintiff.

Appellee's Notice to Clerk for Additional Parts.

Filed January 20, 1905.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, *vs.* JAMES L. KARRICK.	At Law. No. 46600.

To the clerk of the supreme court of the District of Columbia:

In addition to the parts of the record herein, heretofore designated by the defendant and appellant, which the appellant desires to be included in the transcript of the record, the plaintiff and appellee hereby designates the following parts of the record in this

cause which he deems necessary and material for the appeal herein; and you are hereby directed to include the same in the transcript of the record:

1. All of the record of the judgment of the superior court of Suffolk county, Massachusetts, filed with the declaration and made a part thereof.
2. Demurrer to the declaration.
3. Order of June 23, 1904, overruling the demurrer to the declaration.

WM. L. FORD,
Attorney for Plaintiff and Appellee.

Please take notice that I have this 20th day of January, 1905, filed with the clerk of said court a notice, of which the above is a copy, designating other parts of the record in said cause, which the plaintiff and appellee herein deems necessary and material for the appeal; and I have instructed said clerk to include such other parts in the transcript of the record to be prepared by him.

WM. L. FORD,
Attorney for Plaintiff and Appellee.

To Messrs. J. J. Darlington, and Millan & Smith, attorneys for defendant and appellant.

46 *Mandate.*

Filed May 5, 1905.

UNITED STATES OF AMERICA, *ss:*

SEAL. The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas, lately in the supreme court of the District of Columbia, before you, or some of you, in a cause between Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, plaintiff, and James L. Karrick, defendant, law, No. 46,600, wherein the order of the said supreme court entered in said cause on the 29th day of December, A. D. 1904, is in the following words, viz:

"Upon hearing the demurrer of the plaintiff to the second plea of the defendant, it is considered that said demurrer be, and hereby is sustained."

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the

act of Congress in such case made and provided fully and at large appears.

And whereas, in the present term of April, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

47 On consideration whereof, it is now here ordered and adjudged by this court that the order of the said supreme court in this cause be, and the same is hereby, reversed with costs; and that the said defendant James L. Karrick, recover against the said plaintiff sixty-nine dollars and fifty cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said supreme court with directions to vacate such order, and to enter an order overruling the plaintiff's demurrer, with leave to the plaintiff to plead over as he may be advised upon such terms as to the court may seem proper; and for such further proceedings therein, if any, as may be right and just and according to law, and not inconsistent with the opinion of this court.

APRIL 17, 1905.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 5th day of May, in the year of our Lord one thousand nine hundred and five.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Costs of Defendant.

Clerk	$12.00
Attorney	5.00
Printing	
Record	52.50
	$69.50
Record	15.65
	$85.15

48 *Final Judgment.*

Supreme Court of the District of Columbia.

TUESDAY, *May* 16, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff, v. JAMES L. KARRICK, Defendant. } At Law. No. 46600.

Now come here as well the plaintiff by his attorney, William L. Ford, as the defendant by his attorneys Millan & Smith, and in pursuance of the mandate of the Court of Appeals it is considered that the order of this court of December 29th, 1904, be, and the same hereby is, vacated; whereupon it is considered that the demurrer of the plaintiff to the second plea of the defendant be, and the same is hereby overruled; thereupon the plaintiff, by his said attorney, elects to stand upon said demurrer, and upon motion of the defendant, judgment is ordered: Therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff his costs of suit to be taxed by the clerk, including $85.15 costs of appeal adjudged by the Court of Appeals, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals; and leave is granted him to deposit with the clerk of this court the sum of fifty dollars in lieu of an appeal bond.

49 *Memorandum.*

June 8, 1905.—$50. deposited by appellant in lieu of appeal bond.

Directions for Preparation of Record.

Filed June 9, 1905.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, vs. JAMES L. KARRICK. } At Law. No. 46600.

To the clerk of the supreme court of the District of Columbia:

In making up the transcript of the record to be transmitted to the Court of Appeals of the District of Columbia, on appeal by the

plaintiff from the final judgment of May 17, 1905, for the defendant herein, you will include the following portions of the record, and none other, as necessary to the hearing of said appeal:

1. The entire record as designated by the appellant and the appellee in this case on the former appeal (special) herein.
2. Mandate of the Court of Appeals, filed May 5, 1905.
3. The judgment and order of May 17, 1905 herein.

50 4. Noting of appeal from said final judgment in open court.

5. NOTE.—Deposit of $50 in money in lieu of appeal bond.

WM. L. FORD,
Attorney for Plaintiff.

To J. J. Darlington and Millan & Smith, attorneys for defendant:

Please take notice that I shall instruct the clerk of the supreme court of the District of Columbia to make up the transcript of the record in the above-entitled cause according to the above memorandum.

WM. L. FORD,
Attorney for Plaintiff.

We hereby acknowledge service of a copy of the foregoing memorandum and reserve all rights.

MILLAN & SMITH,
Attorneys for Defendant.

51 Supreme Court of the District of Columbia.

MONDAY, *July 3rd*, 1905.

Session resumed, Hon. Thos. H. Anderson, associate justice, presiding.

BERTON O. WETMORE, Adm'r, to the Use of John F. McKay, Plaintiff, vs. JAMES L. KARRICK, Defendant.	At Law.	No. 46600.

It appearing to the court on this 3rd. day of July 1905, that the business in the office of the clerk is so congested that the record in this cause cannot be prepared within the time allowed, it is ordered that said time within which to file the record in the Court of Appeals be, and hereby is, extended until the 1st. day of September, 1905.

52 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 51, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 46,600, at law, wherein Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, is plaintiff, and James L. Karrick is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25th day of August, A. D. 1905.

J. R. YOUNG, *Clerk*.
By FRED. C. O'CONNELL, *Ass't Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1601. Berton O. Wetmore, administrator, &c., appellant, *vs.* James L. Karrick. Court of Appeals, District of Columbia. Filed Aug. 31, 1905. Henry W. Hodges, clerk.

TUESDAY, *October* 10*th*, 1905.

No. 1601.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

vs.

JAMES L. KARRICK.

The above entitled cause was submitted to the consideration of the Court on the printed record filed herein by Mr. W. L. Ford, attorney for the appellant.

No. 1601.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

vs.

JAMES L. KARRICK.

(Opinion per Curiam.)

Opinion.

A former appeal was granted in this case from an order sustaining a demurrer to the defendant's special plea, and that order was reversed and the cause remanded for further proceedings not inconsistent with the opinion then delivered. 32 W. L. R. 435; S. C. 25 App. D. C.

Upon such further proceeding the plaintiff elected to stand upon his said demurrer, and final judgment was thereupon rendered for the defendant. From that judgment the plaintiff has prosecuted this appeal. Having been rendered in accordance with the mandate and opinion of this Court, the judgment will be affirmed with costs; and it is so ordered.

Per Curiam.

Affirmed.

No. 1523.

JAMES L. KARRICK, Appellant,

vs.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY.

Opinion.

(Mr. Justice MORRIS delivered the opinion of the Court.)

A suit between the parties to the controversy now before us was here on a former appeal and seems to have involved the same subject-matter. It was held, in substance, that the suit, as it then

stood, could not be maintained. 22 D. C. App. 487. That suit seems to have been thereupon abandoned, and the present proceedings were instituted wherein very different questions are raised.

The suit is one at common law, instituted in the Supreme Court of the District of Columbia, upon a judgment recovered by the appellee as plaintiff against the appellant as defendant in the Superior Court for the county of Suffolk, in the State of Massachusetts, on November 20, 1900, for the sum of $12,881.46, besides costs, which is alleged in the declaration to remain unsatisfied. With the declaration was filed a copy of the record of the court in Massachusetts, and as the validity of this record as a basis for the present suit is here in question, it is necessary that its condition should to some extent be stated.

The suit in Massachusetts, which seems to have grown out of some building contracts between the appellant and Charles H. Wetmore, deceased, the intestate of the plaintiff therein, was commenced in the year 1892 by attachment proceedings. The defendant, however, the present appellant, subsequently appeared by attorney and pleaded to the declaration. Among the pleas was one of set-off. There was then a trial by jury, who were directed to return a special verdict upon four special interrogatories framed for them. The answers of the jury to these interrogatories seem to have been unfavorable to the defendant in the cause. And yet the defendant came in and moved for judgment. The record fails to disclose what action, if any, was taken on this motion. But the next step seems to have been a motion by the defendant to set aside the special verdict, which was allowed. Thereupon the plaintiff appears to have amended his declaration by filing an additional count, and the parties went to trial again before a jury. There was another special verdict, and also a general verdict in favor of the plaintiff in the case for the sum of $9,169.39.

A motion for a new trial was made and overruled, and then the defendant, according to the record, filed "sundry exceptions to the ruling and opinion of the court in certain matters of law, which were reduced to writing." When these exceptions were filed does not appear; but presumably they were filed on or before March 5, 1894, which was the time assigned within which they were to be filed.

Nothing further seems to have been done for upwards of four years. Then, on June 8, 1897, "at a calling of the docket under the general order of court the action was dismissed." Two days afterwards, on June 10, 1897, the order of dismissal was stricken out and the cause restored to the calendar. A very short time after this, on June 28, 1897, the attorney for the defendant entered an order withdrawing his appearance. There would seem to have been a substitution of attorneys, for the next step that appears in the record is on June 13, 1898, when another attorney, whose name appears nowhere else in the record, also withdrew his appearance for the defendant. Immediately thereafter appears the following entry:

"Thence the case was continued to the July sitting, 1898, when said exceptions, having been presented to the court, were disallowed

as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the questions of law raised by the defendant's exceptions.

"Thence the case was continued from sitting to sitting into the April sitting, 1899, when on the 12th day of June, 1899, at a calling of the docket under the general order of court, said action was dismissed.

"And now at this present October sitting, 1900, to wit, on the 18th day of said October, 1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered."

Then, on November 17, 1900, there was a motion by the plaintiff for the entry of judgment on the verdict of the jury; and judgment was accordingly entered on November 20, 1900, against the defendant for the sum of $12,881.46 and costs of suit, with award of execution.

It is upon this record that the present proceedings were instituted in this District.

The defendant filed two pleas: (1) The general issue of *nul tiel record;* and (2) a special plea, wherein he set- forth that, on June 12, 1899, the cause against him in Massachusetts was dismissed; that, under the rules of the court, that dismissal became final on the first Monday of July, 1899; that the cause remained so dismissed for more than five terms of the court, until October 18, 1900; that in the meantime, on April 29, 1899, the defendant filed his petition in bankruptcy in the District Court of the United States for the District of Colorado, in which in his schedule he enumerated the debt due to said Charles H. Wetmore, and was by the said district court, on June 23, 1899, discharged from all debts provable against him in bankruptcy, wherein was included the debt here sued on; that subsequently to his discharge in bankruptcy, and while the suit in Massachusetts stood dismissed as aforesaid, he made inquiry of the clerk of that court as to the condition of the suit and was informed that the same was no longer pending; that, relying upon this statement, he took no steps in that court to suggest his discharge in bankruptcy; that the action in Massachusetts was sought to be restored to the docket of the court in that State, "*without summons, citation, or notice* of any kind to the defendant, or to any one for him, and without his knowledge;" and that the court had no jurisdiction in the premises to render such judgment.

There was joinder of issue by the plaintiff on the defendant's first plea, and a demurrer to the second; and the demurrer was sustained by the court below. From the order sustaining the demurrer the defendant has been allowed a special appeal to this court; and the cause is now before us on this special appeal.

The question in this case is whether a judgment of dismissal, on its face apparently a final disposition of the cause in which it was rendered, can, after the lapse of five terms of the court by which it was rendered, be stricken out without notice to the defendant, and a judgment rendered in the place of it, equally without

notice to the defendant, in favor of the plaintiff and for the full amount of the latter's claim. And this question, we think, on the plainest principles of justice, whatever may have been the merit of the plaintiff's claim, must be resolved in the negative.

The right to be heard is a fundamental right of every litigant under our system of jurisprudence, and under every system of jurisprudence worthy of the name; and usually it is not denied even in the lawless codes of the most lawless savages; and in the right to be heard the first element is that of notice. The service of process, in other words, notice, is the essential prerequisite to the exercise of jurisdiction by any court. Indeed, it may be said that, strictly speaking, not a single step from the beginning to the end of a legal controversy can be taken without notice to the opposing party; although, of necessity, the notice in many instances is constructive, rather than actual, and the absence of it is an irregularity rather than a defect that would operate to cause a failure of jurisdiction. These are fundamental principles of the law which can not reasonably be controverted; and yet, if we give effect to the contentions of the appellee in the case now before us, it can not be without serious derogation of those principles.

As appears from the record of the court of Massachusetts the appellant here was the defendant in a suit in that court. That suit, after many vicissitudes, resulted in a judgment of dismissal, upon the ground that there had been no prosecution of the cause for twelve months previously thereto, which was a good ground for dismissal under the rules and practice of the court. There would appear, however, to have been some mistake in the matter, and that there had been some action within the previous year. This was on June 12, 1899. Before this order of dismissal, and while the suit was in a state of abeyance, the appellant had instituted proceedings in bankruptcy in the District Court of the United States for the District of Colorado (on April 26, 1899), for the purpose of being discharged from his debts under the bankruptcy laws of the United States, and had in his schedule of indebtedness enumerated the claim for the enforcement of which the suit in Massachusetts had been prosecuted. On June 23, 1899, he received his discharge in bankruptcy. This was seventeen days after the dismissal of the suit in Massachusetts, of which he seems to have had no notice. But immediately after his discharge, with the view of pleading such discharge as a bar to further proceedings in the Massachusetts court, he applied to the clerk of that court to ascertain the condition of the suit there, and was informed, and very truly informed, that there was no suit then pending in that court against him, and that the suit which had been pending against him had been dismissed.

Now, whatever may have been the cause of the dismissal of that suit, whether it was due to a mistake of fact or to a mistake of law, or whatever was the reason for it, as long as it was not done by the fraud of the appellant, which is not pretended, the appellant, under the circumstances, had the right to rely upon it and to rest secure upon its validity. If the dismissal was improper it was not for him to take any steps to correct the impropriety. There was no obliga-

tion upon him to move to have the dismissal stricken out, even to give him an opportunity to plead his discharge in bankruptcy. He was entitled to rest upon the record as he found it and to assume that the cause was at an end. And even if he was chargeable with a knowledge of the infirmity of the judgment of dismissal as having been based upon a mistake of fact, he was entitled to assume that he would be duly notified of any attempt to correct the error. It would certainly be most unreasonable to hold that he was bound to incessant vigilance to see that no step was taken in the matter without his cognizance of the fact. And when it is remembered that, whatever may have been the merit of the original claim against him, and whatever may have been the demerit of his original defense, he had by his discharge in bankruptcy become entitled to a *prima facie* perfect defense which would or at least might have precluded the entry of any judgment against him, as would a plea of payment *puis darein continuance,* if supported by proof, it will be apparent what great injustice could be and was done in this cause by the failure of notice to him of an attempt to convert a judgment in his favor to a judgment against him.

It seems to be conceded that, under the circumstances, only in the suit in Massachusetts could the discharge in bankruptcy have been properly pleaded. It can not be pleaded in the proceedings in this District, for the reason that what purports to be the final judgment of the court in Massachusetts, upon which the present proceedings are based, was rendered after the discharge in bankruptcy. *Dimock v. Revere Copper Company,* 117 U. S. 559. But the appellant proposed to plead it, where it was properly pleadable, in the original suit in Massachusetts; and it may be assumed that he would have done so, if the opportunity to do so had been afforded to him by proper notice that the judgment of dismissal would be stricken out. It seems to be assumed by the appellee that the appellant had lost his right to plead his discharge in bankruptcy by his failure, upon the filing of his petition in bankruptcy, to ask for a stay of proceedings in the Massachusetts court. But this proposition is wholly untenable. It was his privilege to ask for a stay of proceedings, if he so desired; but if he assumed that no judgment would be rendered in that court before his discharge in bankruptcy, and that he would have ample time before the final judgment therein to introduce into the suit the defense of his discharge, he was at perfect liberty to do so. In fact, the proceedings in the Massachusetts court seem to have been stayed during nearly the whole time of the proceedings in bankruptcy and for about two years previously thereto; for the record fails to show that anything whatever was done in the cause in the Massachusetts court between June 10, 1897, when a previous judgment of dismissal was stricken out, and June 12, 1899, when the second judgment of dismissal was entered, except the withdrawal of the defendant's attorneys and the disallowance of the defendant's exceptions at the July term of 1898. Moreover, the only action taken by the court in Massachusetts during the pendency of the bankruptcy proceedings, that

is, between April 26, 1899, and June 23, 1899, was the very dismissal complained of by the appellee, on June 12, 1899, which was a most effectual stay of proceedings.

It is plainly apparent, therefore, from the record before us that the appellant was entitled at any time after June 23, 1899, to go into the court in Massachusetts and there plead his discharge in bankruptcy as a bar to any recovery there against him, if any suit was then pending; that there was no suit then pending in that court; that, when it was sought to revive that suit by striking out the judgment of dismissal, it would have been competent for him then to plead his discharge, if he had the opportunity; that he was deprived of that opportunity by the failure to give him notice, and that thereby he lost a most valuable right. No case can well be supposed which more forcibly illustrates the propriety of giving notice or the gross injustice that may follow from failure to give it. Assuredly it can not be that the law will sanction such a proceeding.

We need not decide the question whether the court in Massachusetts had the authority, after the lapse of five terms of that court, to strike out a judgment of dismissal and to enter a final judgment in favor of the plaintiff. We will assume that it had full power and authority so to do under its rules of practice and under the laws of that State. The full force and credit required by our Federal Constitution and the comity that exists between the States to be given by the courts of one State to the judgments and decrees of the courts of other States, we are disposed to accord even to a greater extent than we might do to the courts of our own jurisdiction, for the reason that many concessions are to be made to difference of practice and difference of statutory law; but in no court of any jurisdiction can we recognize the authority to render judgment against individual citizens without due notice to them, and it is conceded that in the present instance there was no notice of any kind to the appellant or to any one for him of the intended action of the court. It is alleged in the appellant's plea, and it is admitted by the demurrer, that there was absolutely no notice of any kind to the appellant.

In order to maintain the validity of the judgment upon which he sues, the appellee is driven to the necessity of arguing that no notice was required, that the parties were in court, and that the court had jurisdiction over them and over the subject-matter. But the plain answer to this is that the defendant was not in court. He had been dismissed from court without day and was no longer required to take notice of its proceedings. It is absurd to argue that he must be regarded as cognizant of the mistake under which the judgment of dismissal was rendered; that he must be held to know that such judgment was liable to be stricken out; and that, therefore, he was constructively retained in court for an indefinite time, and until the plaintiff thought proper to move in the matter and have the judgment stricken out. This contention, if sustained, would render judgments of dismissal useless and of no value; and yet undoubtedly a judgment of dismissal is as good as any other judg-

ment as long as it stands, and parties are entitled to act upon the faith of it as a valid judgment. It is true that judgments of dismissal, not being rendered upon the merits, are liable to be stricken out; and yet they are final judgments and may terminate the litigation as well as any other judgment. It may not be disturbed any more than a judgment upon the merits after the lapse of the term at which it was rendered. *Bronson v. Schulten,* 104 U. S. 410; *Phillips v. Negley,* 117 U. S. 665.

In these two cases it is shown that there are certain exceptions to the general rule, which may be reduced to three classes: (1) Cases of clerical misprision, as when the judgment rendered was not entered correctly by the clerk; (2) cases of mistakes of fact, such as that one of the parties to the judgment had died before its rendition, or was an infant, or a *feme covert,* or the like, which errors were formerly corrected at the common law by writ of error *coram nobis;* (3) cases in which a bill in equity will lie to prevent the execution of an erroneous or inequitable judgment.

Now here there was no clerical misprision. The judgment entered was the judgment actually rendered and which was intended to be rendered. It is true there was a mistake of fact, as we may assume, but that does not make the judgment a clerical error, but an erroneous judgment, such as might result from a mistaken understanding of testimony. It falls, if at all, within one of the other two classes. But this does not help the case of the appellee. For, while in modern practice, the writ of error *coram nobis* has fallen into disuse, and relief is afforded upon motion supported by affidavits, and while under statutory provisions, as in Massachusetts, relief by motion is also to a limited extent substituted for bill in equity, yet, as both the writ of error *coram nobis* and bill in equity can not be entertained without service of process, so a motion to serve the same purpose must likewise be based upon notice. Notice is as requisite to jurisdiction in the one case as in the other, and the fact that the method of relief is more summary does not in any manner diminish the necessity for its requirement.

Certain cases are cited on behalf of the appellee as tending to support his proposition that a court may, without notice to the party to be affected thereby, set aside a judgment after the term at which it was rendered and enter a new and radically different judgment. These are *Walden v. Craig's Heirs,* 14 Pet. 147; *Odell v. Reynolds,* 70 Fed. Rep. 656; *Emery v. Whitwell,* 6 Mich. 474; *Nowe v. Todd,* 83 Mo. 601; *Mann v. Schroerr,* 50 Mo. 306; *Davis v. Wade,* 58 Mo. App. 641; *Emery v. Berry,* 28 N. H. 473; Block on Judgments, sec. 134; Freeman on Judgments, sec. 142; 17 Amer. and English Encyclopedia of Law (2d ed.), 823. But upon careful examination of these authorities it will be found that in no one of them was the case presented which is now before us, and that the mistakes corrected were mistakes of a clerical nature, apparent on the record.

The case of *Walden v. Craig's Heirs,* 14 Pet. 147, merely held that parties were, under the law of the State of Kentucky, to be regarded as continuing in court for the purpose of carrying a judgment into effect. But this is a very different proposition from that

of wholly invalidating a judgment and converting it into an adverse decision.

The case of Odell *v.* Reynolds is apparently more to the point, but only apparently so. A very brief statement of it will be amply sufficient, notwithstanding the somewhat broad language of the opinion, to show that it is no authority whatever for the proposition advanced on behalf of the appellee in the present case.

In that case a judgment by confession had been entered in the Superior Court of Cook County, in the State of Illinois, for the sum of $25,000, on account of several promissory notes held by the plaintiff and aggregating that amount. The entry of the judgment was on April 18, 1892, and the confession purported to be by a certain person named as "the attorney in fact" for the defendant, and to be an account of "the note filed in the case." There were two defects in the judgment. One was to the effect that the statute law of Illinois forbade the appearance of any one as an attorney in fact to confess judgment, unless he was an attorney at law. The person who had confessed the judgment was in fact an attorney at law; but that fact did not appear affirmatively upon the record, although it was ascertainable from the rolls of the court. Another defect was that the word *"note"* was used in the singular number, indicating that only one note for the sum of $25,000 had been filed, while in fact several notes had been filed of the aggregate amount of $25,000. On February 26, 1893, after the term had expired at which the judgment had been rendered, motion was made to correct it. Whether this motion was made upon notice or without it, the statement of the case does not show. From the opinion in the case of *Odell v. Reynolds* it may be conjectured that it was without notice. The motion was allowed, and the judgment was corrected. Subsequently suit was instituted upon it in the Federal District Court; and there were pleas filed by the defendant, one of them setting forth the insanity of the defendant at the time the judgment was rendered, another to the effect that the judgment had been altered without authority on the part of the court of Cook County so to do, after the lapse of the term. This suit found its way to the Circuit Court of Appeals for the Sixth Circuit, and that court sustained the authority of the Cook County court to correct its judgment.

Assuredly there is nothing in the facts of this case that would justify the contention of the appellee in the case now before us. In that case there was no substantial change whatever in the new judgment that was entered. Indeed, from our standpoint the changes might be regarded as wholly superfluous. The original judgment was against the defendant for $25,000; the corrected judgment was one against the defendant for $25,000. It was of no real consequence whether the claim was upon one note for $25,000 or upon several notes aggregating that sum, or whether it appeared upon the record that the attorney in fact was an attorney at law; and we fail to see how, upon the authority of such a case as this, the action can be vindicated which would convert, without notice

to the party to be affected thereby, a judgment of dismissal in his favor to a judgment against him for upwards of $12,000.

It is upon the reasoning of the case, however, and not upon the facts of it, that the appellee seeks to justify himself; but no more upon the reasoning than upon the facts can he support his contention, for the opinion of the court distinctly and explicitly states the limitations upon the course of procedure which it sanctioned, and which no doubt is entirely correct within these limitations. As the case of *Odell v. Reynolds* is the only case that has been cited which treats this subject at any length from the apparent standpoint of the appellee, and the subject is a grave one in the administration of justice, we are at pains to transcribe so much of the opinion in that case as seems to be pertinent to the issue before us. The court there said:

"The first question to which we shall give attention arises upon the objection of the defendant to the entry made by the Superior Court of Cook County, on the 26th day of February, 1893, in correction and amendment of the judgment which it had rendered on the 18th day of April, 1892. The grounds of that objection, as stated my counsel for defendant in error in argument, are: (1) That the court had no power to make the order, for the reason that the term at which the judgment was rendered had expired, and (2) that the order was made without any notice to the defendant of the proposed action and without his knowledge. * * * On the contrary, it is a power inherent in the authority of every court having general jurisdiction to correct errors in the making up of its records whereby they fail to express the truth in regard to its proceedings. And the power may be exercised by the court at any time when the error is brought to its attention, *and no injury is likely to happen to the parties or other persons by its exercise.* No doubt such power should be cautiously and discreetly used, but that it exists is well established by authority. It is the settled doctrine of the English courts, and in most of the courts of this country. * * * In the present case counsel for defendant submits as a vital objection to the action of the Illinois court in making the entry for correction of February 26, 1893, that 'to make that finding and to insert it in the judgment *nunc pro tunc* was to materially add to and substantially modify the judgment that was rendered as the prior term, for it involved the very character and scope of the agency to which alone Reynolds had committed the right to enter his appearance and confess judgment.' But the consequences of the correction is no test of the power of the court to make it. In Wight's case, just cited, the effect of the entry was to annihilate the whole foundation on which his petition rested. * * * Sometimes the propriety of such action exists in cases where the correction may be made upon that which appears in the record itself and is necessary to make it consistent and harmonious one part with another. In other cases it is necessary in the interest of justice to act upon matters not appearing from the record; for example, things resting in the recollection of the judge, or evidence

adduced *aliunde*. In the former case notice to parties is not nece sary. No new thing is brought upon the record. The court, fo the clearer and more accurate expression of its final action, mold into form that which is fairly and reasonably deducible from th whole record, taken together. There is nothing to litigate. N *right is substantially affected.* (Freeman on Judgments, sec. 72 1 Black on Judgments, sec. 164; *Emery v. Whitwell, ubi supra Mathesen's Adm. v. Grant,* 2 How. 263.) In the latter case the que tion of the necessity of notice may depend upon the source fro which the evidence comes upon which the action is to be take If it is the recollection of the court, it is doubtful whether noti is required, for the reason that it is not open to contest. At a events, it would seem upon the authorities that corrections of th record made by the court upon its own recollection would not b collaterally assailable, though made without notice."

We have underlined certain phrases in this opinion which clearl show the limitation within which it was intended to be restricte The opinion is plainly unexceptionable as applied to the facts o the case which was before the court; but it is equally plain that th ruling of the court was not intended to extend to cases, *where an right was to be substantially affected, or where any of the parti were likely to be injured by the proposed correction.* Now it i difficult to conceive of any case where a right was more substantiall affected, or where one of the parties to the cause was more seriousl injured, than the case now before us.

The case of Wight, 134 U. S. 136, is also cited by the appelle as sustaining his contention that he was entitled to proceed witho notice. But we fail to see wherein that case supports him. Ther it appeared that one Wight, who petitioned to be released on *habea corpus*, had been indicted and convicted in a district court of th United States for a criminal offense. He made a motion for a ne trial and in arrest of judgment, and at that point the district cou certified the cause to the circuit court. The circuit court overrule both motions, but failed to enter any order to remand the caus to the district court. It is not entirely clear from the record whethe the failure to enter such an order was due to oversight on the par of the clerk to note on his record the verbal order that may hav been actually rendered, or resulted from the failure of the cou at the time to make any order. But on the same day on whic the circuit court denied the motions of the defendant, the distric court again took up the case, entered an order overruling the sam motions, and putting upon record its opinion that the case ha been improvidently and without authority certified to the circui court, vacated the order of certification, and thereupon proceede to pronounce sentence upon the defendant. The writ of *habea corpus* was then sued out, and while that writ was pending it wa discovered that, as already stated, no entry had been made remand ing the cause from the circuit court to the district court. There upon the circuit court corrected its record so as to provide for suc an entry. The petitioner's whole case was based upon the absence of any such entry, and the consequent absence, as claimed, of juris

diction on the part of the district court to proceed with the cause. The Supreme Court of the United States held that the correction of the record was lawful.

Now, it is quite apparent from the statement of this case, in which the district judge, who held the district court, also sat with the circuit judge in the circuit court, and both courts were held at the same time in the same court house, that there was an *actual* remanding of the cause by the circuit to the district court; and whether the failure to enter a formal order to that effect was due to misprision of the clerk, who no doubt was the same for both courts, or, as is more likely from the circumstances, was the result of oversight on the part of the judges, or of the view evidently entertained by them, although not entertained, it would seem, by the Supreme Court of the United States, that the order of certification from the district to the circuit court was without authority of law and void; the failure to enter an order for remanding the cause was not a jurisdictional, but a clerical matter. It was intended simply to make a record of that which was actually done by the court, and it did not at all materially alter the nature of the judgment that was rendered. The case of Wight, therefore, is no authority for the position of the appellee in the case now before us.

Various other cases there are of a similar character, in which there has been a relaxation of the rigid rules of the common law that judgments of a court of general jurisdiction may not be altered in any manner after the lapse of the term at which they were rendered. But it is unnecessary to consider them. The relaxation has been only to correct clerical errors, or to fill up a gap in the record when there was actually no gap in the action of the court, or in some way to make the record consistent with itself. In other words, the power of correction remaining in the court would seem to be rather of matters leading up to the judgment itself. But assuming that a judgment itself might be altered in a substantial manner, by way of correction or amendment, after the lapse of the term at which it has been rendered, we find no adjudicated case, and we know of no rule of law or of reason that would justify a substantial alteration of such judgment without notice to the person to be affected thereby. Such notice is jurisdictional, and the failure to give it is not a mere irregularity to be corrected by action in the same court in the case itself, or by appeal to an appellate tribunal. Evidently in the case before us, when the defendant was advised of the action taken against him, it was too late for him to enforce his right by application to that court or by appeal, and it is absurd that he should be driven to such mode of enforcing his right. He had been dismissed from court, and he could not have been called back except by notice, which it is conceded was not given.

From what we have said it follows in our opinion that the action of the Superior Court of Suffolk County, in the State of Massachusetts, in striking out the judgment of June 12, 1899, dismissing the suit between the parties to these proceedings, and rendering on November 20, 1900, in its place and stead a new and radically different judgment for the plaintiff and against the defendant for

the sum of $12,881.46, without notice to the defendant, was without jurisdiction and was null and void. Consequently we think that it was error in the trial court to sustain the demurrer of the plaintiff to the appellant's second plea, and that the demurrer should have been overruled.

The order appealed from will be reversed, with costs; and the cause will be remanded to the Supreme Court of the District of Columbia, with directions to vacate such order, and to enter an order overruling the plaintiff's demurrer, with leave to the plaintiff to plead over as he may be advised upon such terms as to the court may seem proper; and for such further proceedings therein, if any, as may be right and just and according to law, and not inconsistent with this opinion. And it is so ordered.

Reversed.

THURSDAY, *October 12th, A. D.* 1905.

No. 1601. October Term, 1905.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

vs.

JAMES L. KARRICK.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby affirmed with costs.

Per Curiam.

October 12, 1905.

WEDNESDAY, *October 18th, A. D.* 1905.

No. 1601.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

vs.

JAMES L. KARRICK.

On motion of Mr. W. L. Ford, attorney for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue. And it is further ordered that said appellant deposit with the clerk the sum of one hundred dollars in lieu of bond.

Memorandum.

October 25, 1905.—One hundred dollars deposited with the clerk, for costs, in lieu of bond.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you, or some of you, between Berton O. Wetmore, administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, appellant, and James L. Karrick, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinct and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of October, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

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UNITED STATES OF AMERICA, *ss:*

To James L. Karrick, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Berton O. Wetmore, administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected,

and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 25th day of October, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

October 25, 1905.

Service accepted.
J. J. DARLINGTON,
Of Counsel for Defendant in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 25, 1905. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 60 inclusive contain a true copy of the record and proceedings in said Court of Appeals in the case of Berton O. Wetmore, administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, appellant, *vs.* James L. Karrick No. 1601, October Term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of October A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,952. District of Columbia Court of Appeals. Term No. 144. Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, plaintiff in error, *vs.* James L. Karrick. Filed November 3d, 1905. File No. 19,952.